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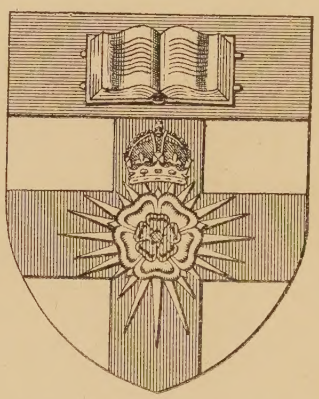

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CASES

DETERMINED BY THE

CHANCERY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

CHIEF JUDGE IN BANKRUPTCY

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE

AND IN

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OF THE

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AND BY THE

CHIEF JUDGE IN BANKRUPTCY

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE

AND IN

LUNACY.

KINLOCK *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL.

C. A. 1879
V.-C. H. *Nov.* 4.
C. A. 1880 *April* 12, 13.

[1879 K. 41.]

Royal Warrant—Grant of Booty of War to Secretary of State "in trust" to distribute amongst Persons found entitled—Trust or Agency—Liability to account.

Her Majesty by Royal warrant "granted" booty of war to the Secretary of State for *India* in Council "in trust" to distribute amongst the persons found entitled to share it by the decree of the Judge of the Court of Admiralty, to whom the matter had been referred by the Sovereign for that purpose, with a direction that doubts should be finally determined by the Secretary of State unless Her Majesty should otherwise order.

An action having been brought against the Secretary of State for *India* in Council by *K.*, on behalf of himself and all the other parties entitled, alleging that a portion only of the fund had been distributed, and claiming an account and the distribution of the residue:—

Held (reversing the decision of *Hall*, V.C.), that the warrant did not

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operate as a transfer of property or create a trust; and that the Defendant, being merely the agent of the Sovereign to distribute the fund, was not liable to account to any of the parties found entitled.

THIS was an appeal from the decision of Vice-Chancellor *Hall*. The action was brought by the Plaintiff "on behalf of himself and all other the persons who under the Royal grant of the 22nd of November, 1866, are entitled to share in the *Banda* and *Kirwee* booty," in order to obtain an account of all money, prize, treasure, notes, and booty of war come to the hands of the Defendant, which formed part of the property of the ex-chiefs of *Banda* and *Kirwee*, and to have an account of all sums of money paid or applied under the provisions of the Royal grant above mentioned, with a direction that any balance remaining undisposed of in the Defendant's hands might be distributed in accordance with the provisions of the Royal grant.

The Plaintiff, a retired army chaplain, was attached during the Indian Rebellion of 1857 to the column under Sir *George Whitlock* which captured the towns of *Banda* and *Kirwee*, and in the course of Sir *George Whitlock's* operations a very large quantity of treasure and booty was captured. By his statement of claim the Plaintiff stated that after the capture Sir *George Whitlock* and other officers applied to Her Majesty for a grant of the captured property among the troops forming the column, to which Her Majesty was pleased to assent; that disputes having arisen as to whether other forces were not entitled to share in the captured property, which was estimated to be of the value of £700,000, all claims to share were by Order in Council, dated the 10th day of June, 1864, referred to the Judge of the Court of Admiralty, who was ordered to make a decree as to the persons who and the proportions in which they were entitled to share; that in June, 1866, the Court of Admiralty decided that the only persons entitled to share were the personal representatives of Lord *Clyde* and his staff in the field at the time of the capture and the officers and troops under Sir *George Whitlock;* and that by a Royal warrant, dated the 22nd of November, 1866, Her Majesty granted to the Secretary of State for *India* in Council the captured property "in trust" to distribute the same among the persons who by the judgment of the Court of Admiralty were entitled to

share. The Plaintiff then averred that part of this property had been distributed, but that the Defendant still had in his hands a large amount which he refused to distribute or account for; and that the accounts which had been furnished were inaccurate and misleading.

The Defendant demurred to the statement of claim on the ground that it did not shew any title in the Plaintiff to the relief which he sought.

The demurrer was argued before Vice-Chancellor *Hall* on the 4th of November, 1879, and during the arguments the Royal warrant of the 22nd of November, 1866, which was only briefly referred to in the statement of claim, was produced and read, and it appeared that the captured booty was to be distributed by the Secretary of State for *India* in Council, "or by any other person or persons whom he might appoint," and it directed that in case any doubt should arise in respect of the distribution of the booty or any claim thereto, it should be determined by the Secretary of State or such persons to whom he should refer the same, which determination was to be final, unless within three months "We shall be pleased otherwise to order, hereby reserving to ourselves to make such other order therein as to us shall seem fit."

Sir *J. Holker*, A.G., and *Macnaghten*, for the demurrer, relied on *Alexander* v. *Duke of Wellington* (1); *Gidley* v. *Lord Palmerston* (2); *Reg.* v. *Lords Commissioners of the Treasury* (3).

W. Pearson, Q.C., and *Willis Bund*, for the Plaintiff, distinguished *Alexander* v. *Duke of Wellington*, and cited *Banda and Kirwee Booty Case* (4); 2 & 3 Will. 4, c. 53, s. 2; 3 & 4 Vict. c. 65, ss. 22, 23; 21 & 22 Vict. c. 106, ss. 6, 7, 39, 40, 65; 31 & 32 Vict. c. 38; *Brown* v. *Harris* (5); *Stevens* v. *Bagwell* (6); *Walsh* v. *Secretary of State for India* (7).

Macnaghten, in reply.

(1) 2 Russ. & My. 35.
(2) 3 Brod. & B. 275.
(3) 41 L. J. (Q.B.) 178.
(4) Law Rep. 1 A. & E. 109; Ibid. 4 A. & E. 436.
(5) 13 Ves. 552.
(6) 15 Ves. 139.
(7) 10 H. L. C. 367.

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HALL, V.C.:—

This question, no doubt, is one of substantial importance, but it seems to me, after all, to resolve itself into a very simple and narrow one. The statements contained in this statement of claim I must take to be correct, always bearing in mind that by arrangement the grants must be considered as before the Court *in extenso*. The title of the Crown to the booty and the competency of the Crown to make a grant of it for distribution among the captors, or such of them as the Crown thinks fit to allow to share it, seems clear. Under the statute which has been referred to, the Crown will now make the distribution depend on the decree or judgment of the Court of Admiralty, which is to be referred to for that purpose, to make what we must consider an equitable and proper distribution of the fund. I am not now considering what property is included within the grant; no question as to that is now before me. There was, however, a grant made, and unquestionably a very large property was included in the grant, which was to be distributed according to the judgment of the Judge to whom the matter was referred. That Judge made his decree, and distributed the fund in certain shares among the persons whom he considered entitled to share in the distribution. That decree was a decree of a Court of competent jurisdiction to deal with the matter, and to determine the rights of the parties; and in order to give effect to it, the Crown made a grant of the property to the Secretary of State for *India*. That grant was made in such a form as to create a trust for the persons who were to share under that decree, and the question I have to determine is whether, that trust being so created by the instrument, there is anything at all which should deprive a person, who unquestionably is a *cestui que trust* under that instrument, of his right to say to the person in whom that property is vested, be he the Secretary of State for *India* or be he anybody else, whether an officer of State or not, "You have a sum of money in your hands belonging to me, I am a *cestui que trust* according to the form, the spirit, and the true intent and meaning of the instrument, and you must account to me, or to me and the others, who are suing along with me, and are represented by me, for that money." Is there any reason why that person should not be entitled to

say that, and say that in this Court, which is the Court for administering trusts? I am at a loss to understand upon what principle I am to say to the claimants, "You have no right to come here. Your proper remedy is to present a memorial to the Secretary of State; this is a matter of State: you will have justice done to you, but you are not to come to one of the Courts of this country, nor to claim that which according to the terms of the grant, construed in an ordinary way, is your right." I do not see upon what principle I can shut the door of the Court against the claim. It is founded upon Act of Parliament, founded upon a decree of a Court of competent jurisdiction, selected by the Sovereign herself for the purpose of adjudicating upon this matter, and the rights have been so determined.

It is, however, contended, that a memorial should be presented, and that this Court should not entertain the matter, and in furtherance of that, it is said that, according to the terms of the grant itself, there is a reservation in favour of the Crown which disentitles the claimants to come here, and sends them elsewhere to have the matter determined by another tribunal. I am here referring to the clause at the end of the grant, which is in the following terms:—"In case any doubt shall arise in respect of the distribution of the booty or proceeds, the same shall be determined by our Secretary of State for *India* in Council for the time being, or by such person or persons to whom he shall refer the same, which determination thereupon made, shall, with all convenient speed, be notified in writing to the Commissioners of our Treasury, and the same shall be finally conclusive to all intents and purposes, unless within three months after the receipt thereof at the office of the Treasury we shall be pleased otherwise to order, and we hereby reserve to ourselves the power to make such other order therein as to us shall seem fit."

Reading, as I do, this clause as being in the statement of claim, is the existence of such a clause inconsistent with the claimant coming to the ordinary jurisdiction of this Court in a case such as is stated in this statement of claim, where there is no doubt or question suggested (and none can suggest itself at all to my mind) upon such a narrative as is contained here? The rights are clear, ascertained, and determined. The proportion which each person is to take is ascertained, and the case is that the

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Defendant, the trustee, has money in his hands which ought to be divided in the ascertained proportions between the parties, and that he has been applied to from time to time and that he will not account, or will not account properly. Therefore the Plaintiff says he must account in this Court. Supposing this case comes to a hearing, and there should be a judgment such as the Plaintiff seeks, and if in the course of taking the accounts any questions should arise being such as would come within the purview of this particular clause, I see no reason why the provisions of that clause should not be resorted to for the purpose of solving those doubts; but that is quite consistent with the Court having a general jurisdiction in the matter of this trust. Therefore I do not think that the existence of that clause was meant altogether to exclude the right of the parties entitled under the decree to come to this Court for the purpose of getting the benefit of it.

With reference to the authorities, the case of *Alexander* v. *Duke of Wellington* (1) (as may be collected from what I have already said) does not appear to me at all to stand in the way of this conclusion. In that case the matter was not in fact disposed of; there was no final grant or decree as there is here. But there was to be a scheme made, the matter was left open, and it was competent to vary that scheme altogether. I think that must have been the view taken by Sir *Robert Phillimore* in the latter of the two cases, looking at the arguments which were addressed to him. But when you proceed under the statute, and have got a decree or judgment such as the statute provides for, the matter is at an end. The Crown has no longer a right to vary that or interfere with it. That seems to me to be the sound view, but, at all events, even if the Crown had the right to do so, it is not suggested that the Crown has had the intention, or would think of doing so.

That seems to be the only case with the exception of *Brown* v. *Harris* (2), which is, I think, as far as it goes, favourable to Mr. *Pearson's* argument. On the whole, it seems to me that the demurrer must be overruled, with the usual consequences.

C. A. The Defendant appealed, and the appeal was heard on the 13th of April, 1880.

(1) 2 Russ. & My. 35. (2) 13 Ves. 552.

Sir *John Holker*, A.G., *Hastings*, Q.C., and *Macnaghten*, Q.C., for the Appellants:—

This warrant was never intended to create the relation of trustee and *cestui que trust*, or to give any person the right to have these accounts taken. The Secretary of State was simply the agent of the Sovereign, in whose hands the fund was placed for distribution: *Alexander* v. *Duke of Wellington* (1); *Gidley* v. *Lord Palmerston* (2). If this were a trust, then the rawest recruit in the force could insist on these accounts being taken.

W. Pearson, Q.C., and *Willis-Bund*, for the Respondent:—

Originally military booty vested in the Crown, and the Act of 54 Geo. 3, c. 86, defined the rights of all parties. That Act was repealed but in substance re-enacted by the *Army Prize Act*, 2 & 3 Will. 4, c. 53, which is now in operation, and by sect. 2 all booty of war is to be disposed of as the Crown shall direct. Then by 3 & 4 Vict. c. 65, s. 22, the Court of Admiralty is empowered "to try all questions concerning booty of war which it shall please Her Majesty to refer to the Court, and the judgment of the Court shall be binding on all parties concerned;" and sect. 24 reserves to the Courts of Law and Equity all jurisdiction over all matters and causes of action which they would have had, had the Act not been passed. The reference to the Admiralty Court in this case was simply to ascertain who were the parties entitled, and the Court has found that the parties we represent are entitled. If, therefore, Courts of Equity would have had jurisdiction in this case before the Act they have it still, and we submit on the authorities that they would have had such jurisdiction. In *The Chinsurah Booty Case* (3), the *East India Company*, then a sovereign power, was ordered to bring booty of war into Court for distribution, and in *Brown* v. *Harris* (4), which was a grant to a private individual, it was held that if the grant had been in the usual form, it would have created a trust. Here the grant is in the usual form.

Then as to the construction of the warrant. It is not an order to a servant of the Crown to distribute the fund, *quâ* agent, but it

(1) 2 Russ. & My. 35.
(2) 3 Brod. & B. 275.
(3) Acton's Rep. 179.
(4) 13 Ves. 552.

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is a legal and valid grant which operates as a completed trust, and which, taken together with the Act, creates a liability to account which can be enforced in this Court.

Lastly, the action is rightly constituted, for by 21 & 22 Vict. c. 106, s. 65, the Secretary of State for *India* in Council may sue and be sued as a body corporate.

[21 & 22 Vict. c. 106, ss. 3, 6, 7, 39, 40; 29 & 30 Vict. c. 47; 31 & 32 Vict. c. 38, were also referred to.]

JAMES, L.J.:—

I am of opinion in this case that the demurrer ought to have been allowed. First of all, with regard to the grantor, the supposed grantee, the subject-matter of the grant, and the persons for whom the grant, as far as it is a grant, was intended. Now, the grantor, of course, was the Queen. The instrument was a warrant, and I am of opinion, although the term "grant" is used as being the effect of the warrant, that the instrument is what it purports to be, a warrant. It is a direction by the Sovereign ordering and authorizing that Sovereign's servant, having possession of the Sovereign's money, to deal with it in a certain way, and the word "trust" introduced into the warrant has really no magical effect. It does not become a trust, in the sense of a trust enforceable and cognizable in a Court of Law, because that word is used. He is directed to do it for the benefit of certain persons, and the word "trust" is nothing more, it appears to me, than if it had said "we hereby give and grant to him these moneys to be distributed in this way." But then another consideration in this matter is, that there really is, in point of law, no such person or body politic whatever as the Secretary of State for *India* in Council. When you look at the Act 21 & 22 Vict. c. 106, which put an end to the *East India Company*, all the property and assets of the *East India Company* were not transferred to any body corporate which were successors to the *East India Company*, but were vested in the Crown in trust for the Government of *India*; and the words "The Secretary of State for *India* in Council," which are mere words providing that that officer and department could be capable of suing and being sued, are nothing more, in my judgment, than words

indicating the mode by which the Government of *India* is to sue and be sued; that is to say, the mode in which the Indian Exchequer might itself institute proceedings, and might be made the subject of proceedings, for the purpose of determining the rights between any of Her Majesty's subjects and that Government. But the Government of *India* is not, it appears to me, capable of being a trustee; nor is the Secretary of State for *India* in Council (the name by which the Government can be sued) a person capable of being a trustee any more than the Attorney-General in this country would be, or any other person who sues in certain cases for or on behalf of the Crown. The truth is, the whole matter is one which is vested in the Crown, but the money still remained to be distributed by the servants of the Crown according to the Crown's directions. The Secretary of State, whichever Secretary of State for the time being it is who has to deal with this matter, deals with it as the agent of the Crown, bound, no doubt, under his responsibility to Parliament, and the moral responsibility which the Crown itself has undertaken from having once made this intimation of bounty, but subject to accounting to the Sovereign, and subject to accounting to Parliament, in case there is any malfeasance or nonfeasance in the matter. It appears to me that it would be a violation of every principle for a municipal Court to take upon itself to enforce the directions which the Sovereign has been minded to give to one of the great officers of State with regard to any particular portion of the Crown property, whether it is in *India* or in *England*. The consequence of holding that this would be a trust enforceable in a Court of Law would be so monstrous that persons would be probably startled at the idea, because, if it be a trust, then every one of those persons in *England* or in *India*, from persons of the highest rank down to the lowest dhoolie bearer, might bring an action for the administration of the trust in a Court of Law, and have all the accounts taken, probably with charges for wilful default and negligence, and disputing the expenditure, and imposing upon the officer of State all the obligations which in this country are imposed upon a person who chooses to accept a trust. It could not have been intended that there should be any such rights in a municipal Court. Then there is the proviso at the end of

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the warrant, which, to my mind, shews clearly that it was never intended to place the thing otherwise than as a Government matter relating to the Government department. It provides, in words amply sufficient for that purpose, that any question connected with this matter as to the individuals who are entitled when the classes are ascertained, or as to any claims on the booty, is to be determined, not by a Court of Law, but by the Secretary of State for *India*, who would, of course, look after the interests of the Indian Exchequer, but with an ultimate appeal to the ultimate tribunal which determines the whole thing, which is the proper one to advise the Queen—viz., the Queen's Commissioners of Treasury in this country—who would decide as between the Indian Exchequer and the person having claims in respect of it, whether those claims were or were not well founded. I am of opinion that there is no such person in truth as the Secretary of State for *India* in Council. There is no such body known, except as a name, as I said before, for suing and being sued on behalf of the Indian Exchequer, and there is no property which can be in the hands or possession of any such body politic as the Secretary of State for *India* in Council.

BAGGALLAY, L.J.:—

I am of the same opinion. The counsel for the Respondent has relied upon what he called a statutory title, and under that statutory title he claims that he is entitled as of right to sue or maintain this action. It is quite true, as he has stated, that by the Act of 2 & 3 Will. 4, c. 53, which was an Act for the purpose of consolidating and amending the laws relating to admitted prize money, it is enacted that in the event of any booty being taken, using that word in its most general sense, the commanders and other officers and soldiers engaged therein should have such rights and interests as His Majesty should think fit to order. Then a subsequent Act of Parliament was passed, the 3 & 4 Vict. c. 65, which provided (sect. 22): "The High Court of Admiralty shall have jurisdiction to decide all matters and questions concerning booty of war or the distribution thereof which it shall please Her Majesty, her heirs and successors, by the advice of Her and their Privy Council, to refer to the judgment of the said Court." No

doubt these Acts of Parliament must have full force and effect given to them, but the real question is what has the Queen ordered with reference to this booty; and, in the second place, what has she referred to the jurisdiction of the Court of Admiralty. The Order in Council of June, 1864, after referring to the fact of this booty having been acquired by the forces under several commanders, and there being conflicting claims as far as regards the right to this booty, some being claims in respect of what is called the *Kirwee* and *Banda* booty, and others being claims in respect of other booty acquired by different bodies of troops, ordered as follows:—"It shall be referred to the Judge of the High Court of Admiralty in *England*, who shall take into his consideration, if it shall appear to him to be necessary for the purposes of justice, any capture that may have been made of any property during the said operations, both in regard to the persons who are, and the proportions in which such persons are, entitled to share therein, and to the costs and expenses incurred in relation thereto by the respective claimants, whether before or subsequent to this Order, reserving however to Her Majesty the right to direct the rates or scales of distribution according to which the said property or the proceeds thereof shall be paid to the several ranks of force or forces to which such property shall be adjudged." Then, as I said, these conflicting claims having been referred to the Court of Admiralty, Dr. *Lushington* reported on the case. He went at very great length into all the history of the proceedings with regard to army prize, and the analogous case of navy prize, and he came to the conclusion that a portion only of the troops which were making these various claims were entitled to share in this booty, viz., the personal representatives of Lord *Clyde*, who had been the Commander-in-Chief, and his staff, and the officers and troops who had been under the command of General Sir *George Whitlock*. That was the matter which was referred to the Court of Admiralty for its decision. Then Her Majesty, having obtained that decision by the Court of Admiralty, issued this further warrant of 1866, which, after reciting the various matters previously referred to, was in form a grant to the Secretary of State for *India* in Council of the aforesaid booty, in trust for the use of the several persons who

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had been adjudged entitled to it by the decree of the Court of Admiralty; and then, by virtue of the reservations which had been contained in the previous order of 1864, this warrant went on to indicate the proportionate shares of each of the several classes of persons found entitled to share. Therefore a direction was then given to the Secretary of State for *India* in Council to make a distribution of the booty amongst those several persons in the proper proportion, according to what was contained in the warrant. Then, having directed the Secretary of State to do that, the warrant goes on: "We are graciously pleased to order and direct that in case any doubt shall arise in respect of the distribution of the booty or proceeds hereby granted as aforesaid, or respecting any claim or demand on the said booty or proceeds, the same shall be determined by our Secretary of State for *India* in Council for the time being, or by such person or persons to whom he shall refer the same." Now it appears to me that that is the clearest reservation of the right of determining any question whatever that might arise in respect of the subject-matter. I think also that the view which the Lord Justice has expressed, that this was no trust, but was merely a direction to or an appointment of one of the officers of State to carry out Her Majesty's wishes in the matter, is borne out by this fact, that there could be no appeal whatever from the decision of the Secretary of State upon any of these various questions, except to the Queen herself. That does not look as though there was any intention to leave a certain part or proportion, or a certain kind of question which might arise in the course of these proceedings, to the arbitrament of any Division of the High Court of Justice—to the Court of Chancery as it then was, or to the Common Law Courts. It appears to me that this is simply and solely a direction on the part of the Queen as to the mode in which her wishes were to be carried into effect. There was no trust created, and nothing to give rise to any such jurisdiction as the Plaintiff seeks to avail himself of in this action.

BRAMWELL, L.J.:—

I am of the same opinion. I really have nothing to add, but the case is of such importance that I prefer not simply to con-

cur without giving my reasons. The question is whether there is by this warrant a transfer of property and a trust created, or whether it is a mere appointment of the Secretary of State for *India* to act as agent for the Queen in the distribution of this prize money. If it were the former, why, monstrous as the inconvenience would be in carrying out the trusts, I suppose an action would lie by any of the *cestuis que trust.* But the inconvenience of such a thing is so enormous, and it is so much better that a sort of discretion should be reserved to the Crown in the matter, to prevent the enormous expense of litigation that might take place, that one would be reluctant, even if the words were much stronger than they are, to hold that there is a trust. I am satisfied that there is no transfer of property and no trust created; and I am satisfied that that is so for the reasons that have been given, which I do not think it necessary to go into any further.

Appeal accordingly allowed without costs, the Appellant not asking for costs.

Solicitor for Appellant: *H. Treasure.*
Solicitors for Respondent: *Whitakers & Woolbert.*

In re WHEAL UNITY WOOD MINING COMPANY.

CHYNOWETH'S CASE.

Cost-book Mine—Fraudulent Transfer—Stannaries Act, 1869 (32 & 33 *Vict.* c. 19), *ss.* 25, 35—*Acceptance of Transferee by Company—Winding-up—Past Member.*

The holder of shares in a cost-book mining company transferred all his shares to a transferee for a nominal consideration. The company registered the transfer and made calls on the transferee, and then discovered that the transferee was a poor man and could not pay anything. They brought an action and recovered judgment against him, and afterwards forfeited his shares for non-payment of calls. More than two years after the transfer an order was made for winding up the company:—

Held, that, assuming that the transfer was fraudulent under the 35th section of the *Stannaries Act*, 1869 (32 & 33 Vict. c. 19), the transfer having been acted on and the shares forfeited by the company, with knowledge of the insolvency of the transferee, it could not be set aside in the winding-up,

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and the name of the transferor could not be put on the list of contributories.

A shareholder in a cost-book mine who has ceased to be a shareholder more than two years before the order for winding up, cannot be put on the list of contributories as a past member, although he had not so ceased for two years before the mine ceased to be worked.

THIS was an appeal from an order of the Vice-Warden of the Stannaries Court,

The *Wheal Unity Wood Mining Company* was a company conducted on the cost-book principle for working a mine in the Stannaries of *Cornwall*. *John Chynoweth* was the holder of 510 shares in the mine. On the 25th of October, 1876, he sold them all to *Robert Allen* for £5. *Robert Allen* was a corporal in the Marines residing at *Plymouth*, and was the brother-in-law of *Chynoweth;* he had no means except his pay. The instrument of transfer was forwarded by *Allen* to the purser of the company, who registered it in the company's books in the same month. The mine had for some time been very unproductive, and £5 was considered by the Vice-Warden to be the full value of the shares.

In November, 1876, a call of 5*s.* per share was made on the shareholders, and a demand for the amount payable in respect of the 510 shares was made upon *Allen*, but he was unable to pay any part of it. On the 29th of January, 1877, the purser wrote to *Chynoweth* stating that he had twice written to *Allen* without receiving a reply, and adding, "As he is personally unknown to me, I shall feel obliged by you kindly informing me with reference to his position, as there is much gossip in the neighbourhood respecting it, and the commercial value of the mine has been considerably affected thereby." To this letter *Chynoweth* replied that he could give no information about *Allen*.

In February, 1877, another call on the shares for a similar amount was made, but *Allen* did not pay any part of it. Accordingly, in April, 1877, the company brought an action against *Allen* for £255, the amount of the two calls, and recovered judgment against him, but were not able to get any of the money.

At a special general meeting of the shareholders on the 24th of May, 1877, a resolution was passed, which was confirmed at a

subsequent meeting, declaring the 510 shares of *R. Allen* to be forfeited for non-payment of calls; and notice of the resolution was sent to *Allen*.

At another meeting held on the 19th of July, 1877, it was resolved that the working of the mine be suspended forthwith the machinery sold, and the affairs of the mine wound up.

The company was not, however, actually wound up before the 14th of February, 1879, when a petition was presented, and an order for winding up was made on the 1st of March following.

Under these circumstances the Vice-Warden held that the transfer to *Allen* was a fraudulent transfer within the meaning of the 35th section of the *Stannaries Act*, 1869 (1), and ordered that the name of *John Chynoweth* should be placed on the list of contributories of the company in respect of the said 510 shares.

From this order *Chynoweth* appealed.

Higgins, Q.C., and *Northmore Lawrence*, for the Appellant:—

This was not a fraudulent transfer within the meaning of the 35th section. The price paid for the shares was quite as much as they were worth. The Appellant did not sell them for the purpose of getting rid of the liability; for he might at any time have got rid of the liability by relinquishing them. It was a *bonâ fide* sale without any reservation to himself; therefore, it would have been perfectly good, independently of this section. But supposing the transfer came within the section, it was not void but only voidable, and the company elected to sanction it, after knowledge of all the circumstances. They registered the transfer, and treated *Allen* as the transferee, and forfeited his shares for non-payment of calls. They could not after that say that the transfer was invalid: *Knight's Case* (2). The Court, in the winding-up, can only set

(1) 32 & 33 Vict. c. 19, s. 35: "A transfer of shares made for the purpose of getting rid of the further liability of a shareholder, as such, for a nominal or no consideration, or to a person without any apparent pecuniary ability to pay the reasonable expenses of working a mine, or to a person in the menial or domestic service of the transferor, shall be presumed to be a fraudulent transfer, and need not be recognised by the company or by the Court on the winding-up of the company, whether the company be a registered or unregistered company."

(2) Law Rep. 2 Ch. 321.

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aside transactions which the company could have set aside if there had been no winding-up.

Hastings, Q.C., and *H. Buckley*, for the official liquidator:—

The transfer was fraudulent within the meaning of the section. It was made for the purpose of getting rid of future liability. The transferor could not have relinquished the shares without paying up his arrears of calls, which he did not wish to do. The company was deceived as to the circumstances, for, although the transferor may have made no untrue statement, he suppressed the real facts. It came before the purser like an ordinary transfer, and he had no reason to suspect anything fraudulent. Although the company did not set aside the transfer, the Court has power to do so now. If the managers of the company neglect their duty in such a case, the Court has power to set the matter right: *Ex parte Kintrea* (1). In the section now under consideration the Court is specially referred to; it says that either the company or the Court may set aside the transfer.

But even if the transfer be supported, the Appellant's name is properly placed on the list of contributories as a past member. The 25th section provides that former shareholders "who have ceased to be shareholders for a period of two years and upwards before the mine has ceased to work or before the date of the winding up," shall not be liable, but in this case the mine ceased to be worked in July, 1877, which was less than two years after the transfer, although the winding-up order was not made till March, 1879; therefore *Chynoweth* is still liable to contribute under sect. 200 of the *Companies Act*, 1862.

JAMES, L.J.:—

It seems to me, with all deference to the Vice-Warden, that this is a very plain case, although it has been argued at great, and I should say, at rather inordinate length. It has been assumed by us that the facts of this case, for the purposes of the argument, bring it within the 35th section, that is to say, that a transfer of shares was made for the purpose of getting rid of any further

(1) Law Rep. 5 Ch. 95.

liability upon them, "for a nominal or no consideration, to a person without any apparent pecuniary means to meet further liabilities." It is said that that is to be now held to be a fraudulent transfer, and that it need not be acknowledged in the winding-up.

Now what is the effect of that section? If the transfer is made in fraud of a person or of a company, the result is that it is voidable—not void, but voidable—at the instance of the person or company who is defrauded. It is a first principle that if a man complains of something that is voidable on the ground of fraud, he must avoid it within a reasonable time after he has had notice of the circumstances constituting the fraud. He must not adopt the thing with knowledge of the circumstances, but must repudiate it at the earliest possible moment at which it can reasonably be done. It appears to me that that was clearly not the case here. It is said that in the first instance the company did not know that the transfer was made to such a person as is mentioned in the 35th section, but I am not convinced that they did not know it. Very shortly after the transfer was registered the purser writes to the transferor to say that the transferee was personally unknown to him, and that there was much gossip in the neighbourhood about him. In answer to that letter Mr. *Chynoweth* says, "He is a person of whom I can give no information." That is about the strongest intimation that could be given to them to put them on inquiry. That they had in fact found out who the man was and where he lived is clear, because they made a first call upon him, and afterwards a second call upon him, and they must therefore have had the means of finding him for that purpose. Then, the calls not having been paid, they bring an action against him, and they recover a judgment for the amount of the calls against him, which judgment is still in force. There may be, it is true, no means of satisfying it, but still it is a judgment in respect of which they could make this man a bankrupt, and which would be available against any resources he has. Having got that judgment against him, they actually proceed to forfeit the shares, by which means they themselves take the shares, become responsible for them, and acquire them as their own property. They did that, as it seems

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to me, with full knowledge of everything material for them to know; and after doing that it is too late for the company to say that they could have taken any proceedings in any Court to set aside the transfer, and to restore Mr. *Chynoweth* to the list. But when the matter comes before the Court in the winding-up, the Court is equally bound in the winding-up by what has been done, and is only entitled in the winding-up to decline to recognise a transfer where it was not too late for the company to have got rid of the transfer. If the company have recognised it, but still in such a way as that they would have been in a position to have got rid of the transfer if there had been no winding-up, then it is not too late for the Court to do it in the winding-up; but as the company have lost all right, as it seems to me, to set aside this transfer, or to deal with the transferor as a shareholder, after they have taken the shares themselves, and are estopped by their own conduct from disputing it, the Court has no jurisdiction to do that for the company which the company have no right to do for themselves. It seems to me, therefore, that this appeal must be allowed.

BAGGALLAY, L.J.:—

I am of the same opinion. Every transfer of shares in mines worked on the cost-book principle must have the effect, to some extent at least, of relieving the shareholder of further liability; but the 35th section of the *Stannaries Act* of 1859 provides that if such a transfer is made for a nominal or no consideration, or to a person without any apparent pecuniary ability to pay the reasonable expenses of working such mine, the company shall not be bound to recognise it. It has been argued that this transfer was within the provisions of that 35th section, and that consequently the company was not bound to register it; but the company did register it as a matter of fact. Again, we may assume that at the time the company did register it they were unaware that the transfer had been made for a nominal consideration, and that the person to whom the transfer was made was not a person of apparent pecuniary ability to pay the reasonable expenses of working the mine. But if not at the time when the transfer was actually left for registration, within a very short

time afterwards, the company become informed to the very fullest extent of the want of pecuniary ability on the part of the transferee. In addition to that, inquiry had been made of the transferor as to the pecuniary position of the transferee, and he in effect, said in answer to the inquiry, "I know nothing about him; you had better find that out for yourselves." Therefore, at a very early period of the registration every circumstance ignorance of which would have entitled them to set it aside was perfectly well known to them.

It would be contrary to every principle on which the jurisdiction and practice of this Court has been based if, after so long a time, parties were allowed to come forward and repudiate a transaction which had been recognised so long. It appears to me, therefore, that this appeal must succeed.

BRAMWELL, L.J.:—

I am of the same opinion; and, as I have said on other occasions, though I have really nothing to add, I do not like silently to concur in a judgment which reverses that of the Vice-Warden, and therefore, out of respect to him, I will state that I have formed an opinion of my own on the matter, and why it seems to me that this appeal must be allowed.

The first argument used was that, independently of the power which the company had under sect. 35 to register the transfer—that is to say, although they need not have registered, but did register it—there was an additional power intended to be given to the Court when the company was wound up. I cannot think that possible. I cannot suppose that the Legislature ever intended that after the company had, with full knowledge, determined to do what they need not have done, the Court should disregard that, and should say, "Although the company choose to do this with their eyes open, we will, notwithstanding, put the transferor on the register." It seems to me impossible to contend that that can be the meaning of the Act.

But, then, Mr. *Buckley* put another point with great brevity, but very clearly, which, it seems to me, is much more plausible, He said that this is to be taken to be a fraudulent transfer under the section. I may say in passing, that that is a most unfortunate

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expression, because it is quite certain that a transaction fully within the meaning of this clause may be a perfectly *bonâ fide* and honest one; for instance, a man may think he is making a handsome present of a share to a servant, nevertheless it is to be deemed a fraudulent transaction. However, it is said that it was a transfer which the company need not have recognised, but which they were induced to recognise by its being presented to them as an ordinary transfer, and they so accepted it in consequence of their being misled. I think that was a very plausible argument, but there are two answers to it. One of them has been given already, and it is this: that assuming the company did not know, in the first instance, that this was a transfer of shares for a nominal consideration, to get rid of further liability—which is a very strong supposition to make, for I think they must have known it; for without saying that £5 is in the abstract a nominal sum, it was uncommonly like a nominal sum in this case, and I should think that the company could have had a very good idea that the transferor was getting rid of his liability for practically a nominal consideration—but assuming that was not so, yet after knowledge and notice of the fact of the transferor's inability or disinclination to give them any information about his transferee which put them on inquiry, they still continued to keep this man on the register and treated him as a shareholder. But then there is another answer, and it is this, that when any person is complaining of a fraud, and claiming the right to rescind a transaction thereupon or to undo it, as a general rule he can only undo it where the Court can put the parties in the same situation as they were in before. How is that possible here? How is the judgment obtained against this transferee to be got rid of? If any good fortune should befall this corporal of marines the company could have him up before a Judge to-morrow upon a judgment debtor's summons, whereupon he would be subject to be put in prison, if having the means of paying the debt, he did not pay it. It is not possible that that which is analogous to the *restitutio in integrum* can be made here, and the company cannot undo that which has been done. It seems to me, therefore, that is a second reason why this order of the learned Vice-Warden cannot be sustained.

I do not know whether it is necessary to say anything about the

operation of the 25th section, because I think the counsel for the Respondent did not rest much upon it. But it is very singular that a section which was intended to decrease the liability should be relied on as tending to increase it. Under sect. 200 I suppose Mr. *Chynoweth* would not be liable now for debts; and I think that the 25th section must have been intended to limit the liability still further. The section is inaccurately worded, for it says: "If he has ceased to be a shareholder for a period of two years or upwards," as if the two things were different. Then comes this remarkable expression, "Before the mine has ceased to be worked, or before the date of the winding-up order." Now I will not say that it is so in all cases, but in the majority of cases certainly, a mine ceases to be worked before a winding-up order is made. To meet such cases it is manifest the draftsman had better have said, "before the date of the winding-up order;' and if the mine continues to be worked after that date, equally it would be right to say, "before the date of the winding-up order." Therefore it comes to this that the words "before the mine ceased to be worked" might have been left out altogether. It is enough that the man has ceased for two years to be a shareholder before the date of the winding-up order, though he did not cease to be a shareholder for two years before the mine ceased to be worked. I think that on that ground also, as well as on those which their Lordships have mentioned, the appeal ought to be allowed.

Bramwell, L.J.

James, L.J.:—

Upon that last observation of Lord Justice *Bramwell* I would add this, that of course a man by ceasing to be a shareholder does not cease to be a partner as regards the then creditors. As long as a man is a partner he is only liable for the partnership debts while he is a partner, and this section is certainly not intended to impose on him any further liability, but to diminish that common law liability to the creditors who had given credit to the partnership.

Solicitors: *J. E. Fox & Co.*, agents for *Chilcott, Truro; Bolton, Robbins, & Busk*, agents for *Downing, Paige, & Kelly, Redruth.*

C. A.
1879
V.-C. B.
May 29, 30.
C. A.
1880
April 27, 30;
May 3, 4.

DICKS *v.* BROOKS.

[1877 D. 244.]

Infringement of Copyright in Engraving—8 *Geo.* 2, *c.* 13—7 *Geo.* 3, *c.* 38—17 *Geo.* 3, *c.* 57—*Wool Pattern taken from Engraving*—*Slander of Title.*

D., the proprietor of a periodical, published with his Christmas number a pattern for wool-work, consisting of the figures in *Millais'* picture, "*The Huguenot*," with a different background. The pattern appeared not to have been taken from the original picture, but to have been made by help of a fine engraving published in 1857. The pattern, as usual in patterns of this kind, was a mosaic built up of small coloured squares. *B.*, who was the owner of the copyright in the engraving, but was not owner of the picture, issued a circular: "We give you notice that if you sell, &c., any copy of our subject "*The Huguenot*" without the stamp or imprint of our firm, in whom the sole subsisting copyright exists, that all such unstamped copies are imitations and unlawfully made." *D.* thereupon brought an action against *B.* for damages, and an injunction in respect of the alleged slander of his title. *B.*, by counter-claim claimed an injunction against the sale of the pattern, and penalties in respect of the infringement of his copyright:—

Held, by *Bacon*, V.C., that the pattern was an infringement of *B.'s* copyright, and that he was entitled to the statutory penalty of 5*s.* for every copy sold by *D.*

Held, on appeal, that a pattern of this description was not a copy of the engraving within the meaning of 7 Geo. 3, c. 38, and 17 Geo. 3, c. 57, as it did not copy or imitate anything which constituted the work of the engraver; and that the counter-claim ought, therefore, to have been dismissed:

Held, also, that, as the circular might reasonably be understood to allege as a matter of fact that *B.* had such a right to the design, as distinguished from the engraving, of "*The Huguenot*" as to make any reproduction of it in any form an infringement of his right, *D.* could have maintained his action if any appreciable injury to his trade from the circular had been proved.

THE Plaintiffs, who were the publishers and proprietors of a weekly periodical called "*Bow Bells*," had published as an illustration for their Christmas number, 1877, a chromo-printed pattern for woolwork called "*The Huguenot*," being the copy of a design for *Berlin* wool which had been imported by a German firm in *Newgate Street*, in whose warehouse it was seen by an agent of the Plaintiffs and purchased for them.

The leading incident in *Millais'* picture—the farewell of two lovers of different creeds on the eve of the Massacre of *St. Bartho-*

lomew, and the attempt of the Roman Catholic girl to preserve her Huguenot lover by binding the white scarf round his arm—was to be found in the Plaintiffs' pattern, but a different background had been introduced, and the colours of the dresses were not identical with those in the picture. As is usual in patterns for working in *Berlin* wool, the whole surface was divided by two cross sets of parallel lines into a number of very small squares, and the design was produced by colouring these squares, the tint of the whole of each square being uniform; so that each part of the design was built up of small squares as in mosaic work.

The Defendants, Messrs. *Brooks*, printsellers and publishers of the *Strand*, were the owners, by assignment, of the copyright in a fine print of "*The Huguenot*," engraved by *Barlow*, from the original picture, and published in 1857.

This print had been extensively pirated, especially by photographers and foreigners. And in December, 1877, after the appearance of the Plaintiffs' advertisements and Christmas number, the Defendants issued the following circular:—

"We give you notice that if you sell or offer for sale, exhibit, or distribute any copy of the subject '*The Huguenot*' without the stamp or imprint of our firm, in whom the sole subsisting copyright exists, that all such unstamped copies are imitations and unlawfully made."

The Plaintiffs, alleging that this circular was a false and malicious libel upon the print or pattern produced by them, and a slander of their title to produce and publish the same; and also that they had been thereby greatly injured both in the sale, and by the depreciation of the value of the copyright, of their Christmas number, and also in the reputation of their firm, and by loss of profits, brought this action, in which they claimed a declaration that the Defendants' circular was a libel upon and a slander of the Plaintiffs' title; damages for the loss thereby sustained; and, if necessary, an injunction against publication of the circular.

The Defendants by their statement of defence and counter-claim averred that the Plaintiffs' pattern was an unlawful copy in whole or in part of the engraving or print, the copyright of which was

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vested in them; that the circular, which referred to all imitations and unlawful copies in general, and not to the copies made and published by the Plaintiffs in particular, was not a false or malicious libel; and that the Plaintiffs had no title to publish such print or pattern. By their counter-claim, after averring their title by assignment to the copyright of the print called "*The Huguenot,*" which was engraved from *Millais'* picture by consent of the original proprietor, and printed and first published in *England* on the 1st of June, 1857 (within twenty-eight years before the grievances complained of), and in respect of which all statutory and other requirements had been duly complied with, and that the Plaintiffs had copied such print without their consent in writing contrary to the provisions of the statutes, and unlawfully published such copies, the Defendants claimed an injunction, an account of all copies made and sold, and of profits made, forfeiture and destruction of the plates on which the print had been copied, the statutory penalty of 5*s.* (one moiety to the Queen and the other to the Defendants) for every such print in their custody either printed or published, or exposed for sale, or otherwise disposed of, and £500 damages.

The action came on for trial before Vice-Chancellor *Bacon* on the 29th of May, 1879.

Mr. *Brooks,* the principal Defendant, in his evidence in Court in support of the counter-claim, stated that in 1868 he had purchased the copyright of the engraving, and had after this purchase caused a photograph to be taken from the engraving, and registered it in 1868; that the original picture had been in the possession of Mr. *Miller,* of *Preston,* for the last eighteen years, and that during that time it had not been out of his possession, and no copy had been allowed to be taken. He had never heard of or met with any other authorized engraving from the picture.

Horton Smith, Q.C., and *Oswald,* for the Plaintiffs:—

We have not in our pattern or wool picture infringed the original engraving or the photograph in which the Defendants claim copyright. Our design is not a copy within the legal definition of the word, as it cannot be said to "come so near to the original as to give to every person seeing it the idea created by the original": *West*

v. *Francis* (1). Assuming that they can establish their claim to copyright in the engraving, the Defendants have no copyright under 17 Geo. 3, c. 57, in the original picture, or in the subject or title of "*The Huguenot*"; and their engraving is not pirated by another engraving or design from the original picture: *Sayre* v. *Moore* (2); *De Berenger* v. *Wheble* (3). Beyond the leading incident and title there is no similarity between the Defendants' engraving and our design. The object and purpose of the two designs are quite distinct; a different effect would be produced by the one and by the other to the mind of any person comparing them together; and an injunction could not have been obtained by the Defendants, as we have not injured the sale of their engraving: *Martin* v. *Wright* (4).

We prove special damage by a decrease in the sale of our publication as the result of the unjustifiable course taken by the Defendants in issuing their circular of December, 1877; and as the action for slander of title is not confined to slander of title to real estate, but extends to depreciation of property of any sort, our action is rightly framed: *Bullen & Leake* (5). We prove malice in law if not in fact, and it is not the less an injury for which we are entitled to our remedy in damages that this statement, which, so far as it affected us, was a slander uttered without just cause, is said to have been issued as a general warning and not specially directed against the Plaintiffs: *Bromage* v. *Prosser* (6). As to the relief by injunction claimed by the Plaintiffs, the jurisdiction of granting injunctions has been greatly enlarged by the *Judicature Act*, 1873, s. 25, sub-s. 8: *Beddow* v. *Beddow* (7).

[BACON, V.C.:—I do not believe that sect. 25, sub-sect. 8, has added in the slightest degree to the power of this Court to grant an injunction.]

At all events it has been held that an injunction, as well as damages will now be granted in respect of a libellous publication injurious to property: *Thorley's Cattle Food Company* v. *Mas-*

(1) 5 B. & A. 737, 743.
(2) 1 East, 361, n.
(3) 2 Stark. N. P. C. 548.
(4) 6 Sim. 297.
(5) Pages 404, 405.
(6) 4 B. & C. 247, 253.
(7) 9 Ch. D. 89.

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sam (1); *Hinrichs* v. *Berndes* (before the Master of the Rolls, January 18, 1878); *Saxby* v. *Easterbrook* (2).

[They also cited *Carr* v. *Duckett* (3) on the question of pleading.]

Hemming, Q.C., and *Dauney*, for the Defendants:—

The Plaintiffs, who are mere infringers, have made out no case for relief; and, on the other hand, in publishing a design which is taken from and is a clear piracy of the engraving, to the copyright in which we are entitled, they have rendered themselves liable to penalties under the *Copyright of Designs Acts*, 8 Geo. 2, c. 13; 7 Geo. 3, c. 38; and 17 Geo. 3, c. 57, on which we rest our counter-claim. By virtue of our assignment we are entitled to every right that the original assignee from Mr. *Millais* of the right of engraving the picture could assert: *Thompson* v. *Symonds* (4). No doubt the action for slander of title is not confined to real estate, but extends to personalty also; but unless it can be shewn that our circular was issued *malâ fide* and only with the intention to injure the Plaintiffs, or that the circumstances were such as to make it altogether wrongful, no action will lie against the Defendants, who claim the exclusive right to the engraving, for warning intending purchasers of their intention to enforce such right: *Wren* v. *Weild* (5).

With respect to the photograph from the engraving, our claim to copyright is under 25 & 26 Vict. c. 68, the provisions of which as to registration have been complied with by the Defendants.

Horton Smith, Q.C., and *Oswald*, for the Plaintiffs, in opposition to the counter-claim:—

The Defendants, who by their counter-claim sue for penalties as assignees of the copyright of the engraving, have not proved their title nor complied with the provisions of the Act, which require that the assignment should be in writing and attested by two witnesses. Without this they cannot maintain an action for infringement of copyright: *Power* v. *Walker* (6); *Davidson* v. *Bohn* (7). As the counter-claim is in the nature of a penal

(1) 6 Ch. D. 574; 14 Ch. D. 763.
(2) 3 C. P. D. 339.
(3) 5 H. & N. 783.
(4) 5 T. R. 41, 46.
(5) Law Rep. 4 Q. B. 730.
(6) 3 M. & S. 7.
(7) 6 C. B. 456.

action, all the requisites of the Act must be strictly complied with and every devolution of title strictly proved, and this they have failed to do.

Hemming, Q.C., *contrà* :—

The cases cited were decided upon the Act 8 Anne, c. 19, but the counter-claim is brought under 8 Geo. 2, c. 13, which imposes penalties for copying and selling, &c., any such print or any parts thereof "without the consent of the proprietor or proprietors thereof first had and obtained in writing signed by him or them respectively in the presence of two or more credible witnesses." The Defendants are the proprietors of this print or engraving for all purposes, and there is nothing in the *Copyright of Designs Acts* requiring them to shew that the assignment under which they claim was in writing and attested by two witnesses. In any case our statutory title to the photograph is beyond doubt, as it has been registered under 25 & 26 Vict. c. 68, and the Plaintiffs' design is no less a copy from the photograph than from the engraving, and cannot, and indeed is not alleged to, have been taken from the original picture. Besides, even if the proof of our title were imperfect, it is quite immaterial so far as the penalties are concerned, for they may be recovered by a common informer without any title at all.

BACON, V.C. :—

I must say that this is a most extraordinary proceeding. The Plaintiffs in the action complain that they had published a chromo-printed pattern for woolwork, with printed directions, and extensively advertised it; that in December the Defendants wrote to them:—"If you sell, or offer for sale, exhibit, or distribute any copy of the subject, '*The Huguenot*,' without the stamp or imprint of our firm, in whom the sole subsisting copyright exists, all such unstamped copies are imitations and unlawfully made." They complain that that was circulated. The Plaintiffs deny that the Defendants have any copyright in the said subject, "*The Huguenot*," and then they complain of the damage which they have suffered. Then they allege, "It is not the fact

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that the said print or pattern published by the Plaintiffs is an imitation colourable, or otherwise, of any picture to the copyright of which the Defendants are entitled," and further, that the circular is "a false and malicious libel upon the said print or pattern so produced, and a slander on the title of the Plaintiffs." The Plaintiffs have endeavoured to induce the Defendants to stop the publication of the circular, and to compensate them for its publication, and they ask a declaration (in the terms above stated). That is the Plaintiffs' claim, which is founded upon the allegation that they have the right and title to print and publish the thing in question. The answer of the Defendants to that is that they bought a copper-plate engraving and paid for it, and they have proved that they bought it and paid for it, no assignment whatever being necessary, delivery from hand to hand would be enough for that purpose. They say, having become by payment of their money, and by delivery of the thing that they bought, the owners of that copper-plate, they caused the photograph to be made from it, and they registered that photograph in the manner prescribed by or permitted by the Act of Parliament, and that thereupon they became the sole owners of a photograph at all events; and the photograph is identical in design and subject with the engraving which they have bought and paid for. It is said that they have no title to that because the statutes require that an assignment should be in writing, as they do for the purpose of justifying any person who, by way of defence, says, The title is mine. All this story which I have read from the statement of claim, and the evidence given in support of it, is, that being accidentally in a wool warehouse in *Newgate Street*, or somewhere else, an agent of the Plaintiffs saw the thing in question; he bought it for the purpose of improving the circulation of a periodical in which the Plaintiffs were interested, they got it copied by some printer who is not called as a witness (a remarkable circumstance, in my opinion, in this case), they got a large number, 25,000 copies, of it printed, and their complaint is that the sale of those copies has been interfered with by the Defendants. Nobody ever heard of such a case.

Now, the first question that presents itself is whether what has been done is an infringement of that title which the Defendants get under the Copyright Acts, and especially by the registration of

a photograph under the last Act that has been referred to. In my opinion it does not admit of question. [His Lordship, after adverting to the alleged differences between the registered photograph and the design in *Berlin* wool, continued:—]

The object of the statute is to prevent a copy or imitation in whole or in part. The definition read from *West* v. *Francis* (1), which I should not adopt exclusively, and conclusively, as applying to every case (although it applied perfectly to the case in which it was used) is, that a copy is a thing which presents the same idea as the thing copied from. Can there be any doubt that this presents exactly the same idea? It may be that for the purpose of being worked in wool it would require light at the left hand corner of the picture, and so a castle is introduced, but the painter who painted the picture, which has excited universal admiration, thought it right that for the purpose of his picture there should be a closed background, representing a sort of thicket, in which the lovers are taking a farewell; and the original picture is entitled "*The Eve of St. Bartholomew's Day*," so that the idea intended to be conveyed by the painter was that on the eve of the tragic events which happened on *St. Bartholomew's* day a Huguenot lover was taking leave of his mistress, and that they had chosen a secluded spot in a wood. It is said that because a Chinese gothic castle is introduced in a corner, from the window of which anybody might see these lovers, that that is an alteration which justified the Plaintiffs in saying that it was in no sense or respect a copy.

It is only necessary to look at the two things to answer that objection. The Plaintiffs' publication is for worsted work, but as to its being a direct copy intentionally and purposely made from the photograph, or the engraving from which it was taken, nobody alive can entertain any doubt.

Then, is that what the Act of Parliament meant to prevent? The Act of Parliament meant to provide for a case which was altogether new; it meant to protect the original painter to a certain extent, and particularly to protect the engraver, treating an engraving as a commercial property deserving of the protection of the law; and it endeavoured, and I think effectually endeavoured,

(1) 5 B. & A. 737.

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to prevent any infringement of rights so obtained. The Plaintiffs coming with this thing, which they say is not an engraving, is not a print, and is not a picture, say that they have a right to despoil the owner of the copyright of the photograph—of which alone I speak, not forgetting the right to the engraving—of his property in this by foisting upon the public a very coarse imitation of a very celebrated picture to gain for their own purposes the interest which is attached to that picture. They say they have a right to do this, that they can do it not only without objection, not only without any prevention on the part of the owner of the copyright, but to his positive damage. It reminds one of the fable of the wolf and the lamb. He, who is a mere pirate, who has merely unjustly copied another man's property, complains that his title is slandered, and that he is scandalized by this publication of the circular. Who ever heard that slander of title meant anything like that? *Blackacre* or *Whiteacre* being in dispute between two parties, one says: "*Whiteacre* is mine, I am going to bring an action of ejectment. I tell you so, I advertise it publicly;" upon which the other man comes and says to a Court of Justice, "Here is a man slandering my title; I am the owner of *Whiteacre*, and he says he is going to bring an action against me." The correspondence which is referred to is equivalent to that. The Defendants' solicitor says, "I shall be obliged to take proceedings against you if you do that which I have cautioned you against doing." The Plaintiffs in the action then take the wind out of their sails, as it were, by bringing this action for slander of title, and they ask the Court to infer malice in the slandering of their title. A number of cases were referred to, perfectly good authorities, but having no kind of application to the case before me—to establish the case of a malicious intention on the part of the owner of the copyright when he says to a pirate, "You shall not invade my right." The case is preposterous. I have no doubt that, with a deliberate intention of appropriating to themselves that which was the Defendants' property, advantage was taken of the fact that this German pirate, who is out of reach, had sent over this thing here to be worked in wool. I have no doubt that that was the motive of the Plaintiffs, and that that was done knowingly and purposely. If malice or slander is to be imported into the

case at all, it would be very readily found in the conduct which the Plaintiffs have pursued.

It is said it is not a picture. Why is it not a picture? Why is it not within the very words of the Act of Parliament? It is a picture. Pictures made of wool are just as much pictures as if they were painted in oil or distemper. The great cartoons were painted in distemper in order that they might be worked in wool, and in wool they were worked at *Arras* before *Berlin* wool was known. They are no less pictures because they are done with coloured wool instead of some mineral colour or some other colour laid on by means of some appliance.

In my opinion the case is perfectly clear. There is no pretence for the action, and that must be dismissed. The counter-claim is good under the Acts of Parliament, beginning with the *Hogarth Act* (8 Geo. 2, c. 13), and carried down to the 25th and 26th of the Queen, which give the Defendants a full title and right to restrain these Plaintiffs from continuing the wrong which they have endeavoured to do, and give them a title to have that penalty which the Act of Parliament has prescribed, of 5*s.* for every copy, in the usual form, with the costs of the action and of the counter-claim.

Dicks & Co. appealed. The appeal came on for hearing on the 27th of April, 1880.

On the hearing of the appeal, in order to shew that there were sources from which the design might have been taken other than the Defendants' print and photograph, a woodcut was produced published in the *Illustrated London News* at the time when the picture was first exhibited, long before the publication of the Defendants' engraving, and an etching which was printed some time before the plate. It was shewn, however, that during the progress of the engraving certain slight alterations in the design had been made under the direction of Mr. *Millais,* so that the design of the print did not in all respects correspond with that of the original picture. In those points of difference the *Berlin* wool pattern corresponded with the print and not with the original picture or the woodcut.

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Davey, Q.C., *Whitehorne*, and *Oswald*, for the Appellants:—

We contend that the object of the Acts was not to protect designs, but to prevent rival engravers from copying each other's work, and that there is no piracy unless something is copied which constitutes the work of the engraver as distinguished from that of the painter. The Act 8 Geo. 2, c. 13, applied only to prints where the engraver was also the designer. The Act 7 Geo. 3, c. 38, extended the protection of the former Act to prints of which the engraver was not the original designer. In both the Acts what is forbidden is the copying of the prints, not reproduction of the designs. The work of the engraver is what it is sought to protect: *Graves* v. *Ashford* (1). The Act 15 & 16 Vict. c. 12, s. 14, included lithographs, but there is no provision against a fresh engraving from the original picture. We say that this is not a copy of the engraving. Admitting the design to have been taken from the engraving, there is no copying of anything constituting the engraver's work. A *Berlin* wool pattern is an entirely different thing, nobody would buy it instead of the print, and it in no way interferes with the credit of the engraver or the rights of the proprietor of the engraving. We say then that we have done nothing of which the Defendants have any right to complain, and that on this ground alone the counter-claim ought to have been dismissed. The circular interferes with our lawful trade, and is actionable on the principles of *Axmann* v. *Lund* (2), *Western Counties Manure Company* v. *Lawes Chemical Manure Company* (3), and *Thorley's Cattle Food Company* v. *Massam* (4).

Hemming, Q.C., and *Ingham*, for *Brooks & Co.*, were desired in the first instance to confine themselves to the question whether the *Berlin* wool pattern was a copy of the engraving:—

This is a copy: *West* v. *Francis* (5).

[JAMES, L.J.:—If an engraver were to make an engraving from the worsted work, would that be a copy of the Defendants' print?]

(1) Law Rep. 2 C. P. 410.
(2) Ibid. 18 Eq. 330.
(3) Law Rep. 9 Ex. 218.
(4) 14 Ch. D. 763.
(5) 5 B. & A. 737.

There is nothing in the Act to restrict the protection to what the engraver invents, and protection has in fact been given where the engraver invented nothing but simply copied the lines of the figures annexed to a specification. Suppose that the engraver had worked without any copy, inventing the design as he went on, surely this would have been a copy. Can it be any the less a copy because there happens to be an original picture, when the pattern has been taken, not from the original picture, but from the engraving? The invention of the painter must enure for the benefit of the engraver, who in fact pays the painter for it. The second Act in terms gives the engraver the benefit of the first Act as if he had been the designer, and so places him in the position of the designer, except as against the owner of the picture and persons claiming under him, and the words of 17 Geo. 3, c. 57, are very wide. One object of the Acts was to prevent the reputation of the engraver being injured by the circulation of copies of inferior merit, *Gambart* v. *Ball* (1), in which case it is stated that the statute prohibits all processes for indefinite multiplication of copies, and *Graves* v. *Ashford* (2) goes on the same principle. In truth the only limitation which has since been suggested on the generality of the words of the statutes is that they are not to be applied to single copies as distinguished from processes for multiplying copies.

[BRAMWELL, L.J.:—The question is, what is a copy?]

The word must be taken in its natural sense. The details in which the skill of the engraver is exhibited cannot be the only things to be protected, for the Act expressly prohibits a copy in mezzotint, and a copy in mezzotint from a line engraving would not copy a single line. Nothing would be taken from the line engraving but what came from the picture. It is said that a mezzotint would enter into commercial rivalry with a line engraving, and that a *Berlin* wool copy cannot, but that argument would apply to any bad copy. *Newton* v. *Cowie* (3) shews that the statute will be construed liberally in favour of the person protected, quite irrespectively of any invention on his part.

(1) 14 C. B. (N.S.) 306. (2) Law Rep. 2 C. P. 410.
(3) 4 Bing. 234.

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JAMES, L.J.:—

The question before us resolves itself into this—whether this pattern for working in *Berlin* wool is a piratical copy of the print of which the Defendants are the proprietors. It appears to me that the Vice-Chancellor fell into (if I may venture so to call it) the error of supposing that the case was within the Act 8 Geo. 2, c. 13, which gave a protection, not to a mere engraver, but to a man of genius who by his industry, pains, and expense invented a design, "or engraved, etched, or worked, or from his own work and invention caused to be designed and engraved, etched, or worked," and so on, "any historical print."

Those words were intended to give protection for the genius exhibited in the invention of the design, and the protection was commensurate with the invention and design. That Act was afterwards extended to embrace the case of persons engraving from something which was not the design of the engraver. Now it appears to me that the protection given by the subsequent Acts to the mere engraver was intended to be, and was, commensurate with that which the engraver did, that the engraver did not acquire against anybody in the world any right to that which was the work of the original painter, did not acquire any right to the design, did not acquire any right to the grouping or composition, because that was not his work but the work of the original painter. What, as it seems to me, the Act gave him, and intended to give him, was protection for that which was his own meritorious work. The art of the engraver is often of the very highest character, as in the print before me. It is difficult to conceive any skill or art much higher than that which has by a wonderful combination of lines and touches reproduced the very texture and softness of the hair, the very texture and softness of the dress, and the expression of love and admiration in the eyes of the lady looking up at her lover. That art or skill was the thing which, as I believe, was intended to be protected by the Acts of Parliament, and what we have to consider is, whether the wool pattern before us (the maker of which must have been aided in the production of it by having before him the Defendants' print, or some kind of copy of it, because the wool pattern follows the print in some particulars in which the print differs from the picture) is a copy of the

engraver's work? It appears to me that without going into any etymological definition of the word "copy," and using the word in the ordinary sense of mankind as applied to the subject-matter, the question is, Is this a copy, is it a piracy, is it a piratical imitation of the engraving—of that which was the engraver's meritorious work in the print? I am of opinion, as a matter of fact, that the wool pattern is not a copy, is not a piratical imitation, is not a copy with colourable variations of the Defendants' engraving. The alleged copy is not a thing intended as a print in the ordinary sense of the word. It was intended to be printed, and was printed, as a pattern for *Berlin* wool, not put forward in any way fraudulently or as a sham, but really in truth intended solely for that purpose. Now, I am of opinion that, whatever may be the similarities between the one and the other, the attempt not to reproduce the print, but to produce something which has some distant resemblance to the print, not by anything in the nature of the engraver's work, but by what I may call a mosaic of coloured parallelograms, is not in any sense of the word a piratical imitation of the print. Nobody would ever take it to be the print, nobody would ever buy it instead of the print, nobody would ever suppose that it was, to use the language of the first Act, a base copy of the print. It is a work of a different class, intended for a different purpose, and, in my opinion, no more calculated to injure the print *quâ* print, or the reputation of the engraver, or the commercial value of the engraving in the hands of the proprietor, than if the same group were reproduced from the same engraving by waxwork at Madame *Tussaud's*, or in a plaster of *Paris* cast, or in a painting on porcelain. I cannot conceive that such a reproduction of the subject in tapestry, or *Berlin* wool, or upon china, or in earthenware, is within the meaning of the Act of Parliament. Whether dealing with it as a matter of law, or dealing with it, as we must do, as a matter of fact, I am satisfied that the Appellants' pattern is not a copy or piracy of any part of that which constituted the real merit and labour of the engraver of the Defendants' print.

BAGGALLAY, L.J.:—

I also am of opinion that this *Berlin* wool pattern is not a copy of

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the Defendants' print within the meaning of the statutes. Reliance has been placed upon the very general words of the 17 Geo. 3, c. 57, which refer to engraving, etching, or working, or causing or preventing to be engraved, etched, or worked in mezzotinto, or chiaro-oscuro, or otherwise, or in any other manner copying in the whole or in part any print. Now, it is perfectly clear that those words must receive some limitation, for they cannot have been intended to apply to a lady copying a print or a part of a print upon a china plate, or to a person who for his own amusement makes an etching, drawing, or water-colour sketch from an engraving. If, then, we are to limit the meaning of the word "copy," how are we to judge of the extent to which it is to be limited? I think we can only do that by having regard to the preambles to the several statutes. We find an important preamble in the first Act, and then in the second and the third of the Acts it is stated that the former Act has not been sufficient for effectuating the desired purpose. Now I think that in *Gambart* v. *Ball* (1) the object of the Acts was well pointed out as being of two-fold character, first, the protection of the reputation of the engraver, and secondly, his protection against any invasion of his commercial property in the print. It seems to me idle to suggest that in this case the reputation of the engraver from whose hands this beautiful engraving proceeded will suffer from the publication of a print intended for the purpose of ladies or others working in *Berlin* wool from it; and as regards his commercial property, it appears to me almost as absurd to imagine that the commercial position of the owner of the print could suffer by the sale or the publication of this article.

I do not mean to say that a representation of this print in chromo-lithography, executed with that high skill and art with which works in chromo-lithography are now executed, could not be treated as a copy of the print prohibited by the statute. I do not say that it would be so, but I consider it a fairly arguable question. Here, however, though we have no doubt a young man and a young woman standing up in the centre of the picture in the same attitudes as in the print, in other respects the two designs have hardly anything in common. Again, this pattern

(1) 14 C. B. (N.S.) 306.

cannot be called a work of art. The wool-work eventually to be made might probably be a work of art, but as for this pattern you might almost as well call a representation of the King and Queen on a ginger-bread stall at a fair a work of art.

I am of opinion, therefore, that this pattern cannot be looked upon as a copy of the engraving within the intent and meaning of the Acts.

BRAMWELL, L.J.:—

I am of the same opinion, and should add nothing were it not that I do not like differing from the learned Judge in the Court below without shewing that I have done my best to form an opinion upon the matter.

I should have thought it tolerably plain, as has been said by the Lord Justice *James*, that the object of these statutes was to protect the engraver, and that what the Legislature contemplated was that his work as an engraver should not be pirated, that there should not be another plate made—another engraving the engraver of which availed himself of what had been done by his predecessor. That this is the true construction of the Act of Parliament, is, I think, shewn by the expressions that are used, for instance, that the pirated plate is to be destroyed; and I am very much inclined to think that the omission of the words "or otherwise copy" from the 7 Geo. 3, c. 38, was the result of an opinion on the part of its framer that that was the meaning of the first Act; and though the words "or otherwise copy" occur in the first Act and in the third, I think the intention was only to prohibit a piratical reproduction of the original engraving. I do not at all mean to say that the words "or otherwise copy" are to have no meaning, I think they were put in with a view to the possibility that by some means other than engraving a copy might be made the maker of which would be taking the benefit of the engraver's work and produce a sort of equivalent or substitute for the engraving of what I may call an engraving character. I think that a strong argument in support of this view is furnished by the following considerations. It has been held that these statutes were partly for the protection of the fame of the artist. Now how can his fame be injured except by the circulation of

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something which might be taken to be his work? Is it conceivable that anybody could confound this pattern with an artistic engraving and say, "Oh! that must be the engraver's production!" To my mind, that consideration furnishes a strong argument that what the Legislature had in view was a new engraving, or something which could be taken as an engraving or an equivalent to it.

Now, what are the facts of this particular case? There is a picture of which the Defendants are not the owners. It is conceded that anybody might have gone to that picture and made a fresh engraving of it upon a fresh plate unless there had been some bargain which precluded his having a right to do so. It is conceded *a multo fortiori* that the persons who prepared this pattern might have gone to the picture and taken from it the materials for producing that pattern. A further fact that I may mention is this. I have very little doubt, and I should find it as a fact if necessary, that this pattern was either mediately or immediately got from the engraving, since it follows the engraving in particulars in which the engraving differs from the original picture. But if the pattern might with these trifling variations have been taken from the original picture without infringing the engraving, how can it be possible to say that, because the man who prepared it instead of going to the picture thought it more convenient to take this engraving, or possibly a smaller one, or possibly the etching (for any one of them would have served his purpose because all he wanted was the outline), the case is brought within the Act? I do not say that if this were an ordinary engraving with no picture, a lithograph taken from it would not be a copy. I think that a photograph taken from it would be a copy. I do not say that if this were an original engraving with no picture, and a copy were made of it and afterwards coloured, there might not be some ground for saying that there was a piracy of the art and skill of the engraver. I should have very great misgiving about it, because I doubt whether the statutes were not intended to protect the artist's skill as an engraver only, and not as a draftsman. I give no opinion on the point, and I only mention it for the purpose of shewing that this particular case is not that which I have supposed, but is a case in which the man might have done everything that

he has done by going to the picture instead of using the more convenient, more accessible, and more manageable thing, the engraving. I cannot but think, therefore, with great submission to the learned Judge in the Court below, that this is not a copy within the statutes of Mr. *Barlow's* most beautiful engraving.

The argument then proceeded on the Plaintiffs' claim for damages, and Mr. *Brooks* was examined in Court as to the issuing of the circular complained of. It appeared that three copies only had been sent out, two to photographers and one to a bookseller named *Baker*, who had bought a number of copies of *Bow Bells* from the Plaintiffs. *Baker*, on receipt of the circular, brought back the unsold copies, and the Plaintiffs took them back. *Baker* deposed that in his opinion if this circular had not been received he should have sold all the copies he had taken and should have wanted more.

Davey, Q.C., *Whitehorne*, and *Oswald*, for the Appellants:—

On this evidence the Plaintiffs are entitled to an inquiry as to damages.

[JAMES, L.J.:—You must prove some damage, not merely nominal, before you can have an inquiry.]

The Court always discourages going into a mass of evidence before the inquiry, and on an inquiry we can prove further damage.

Hemming, Q.C., and *Ingham*, for the Defendant, were not called upon.

BRAMWELL, L.J.:—

I at one time felt considerable doubt whether, if damage to the Plaintiffs' trade had been traced to the publication of this circular, it was actionable, because undoubtedly every man has a right to say, "I am the proprietor of such and such a print, and I warn all the world, and you in particular, not to pirate it." If the Defendants had merely said that, and then gone on to say, "We warn you that a

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chromo-lithographic copy or reproduction of it, although designed for *Berlin* wool purposes, is a piracy," although, according to our opinion, they would have been wrong in their law with respect to its being a piracy, I think their saying so would not have been actionable, because a man is not bound to be correct in his statement of the law, though he is bound to be correct in his statement of facts. But there is an expression in the circular which makes me think that it would have been actionable if damage had been traced to it. The circular says, "We give you notice that if you sell or offer for sale, exhibit, or distribute any copy of the subject, '*The Huguenot*,' without the stamp or imprint of our firm, in whom the sole subsisting copyright exists, that all such unstamped copies are imitations, and unlawfully made." Now that may have been intended as a statement of the Defendants' view of the law, but anybody might not unreasonably take it as a statement of the fact that somehow or other they had got such a right to the subject that, let it be reproduced in whatever form it might be, such reproduction was an infringement of their rights. I think, therefore, that if damages had been traced to the circular an action would have been maintainable upon the principle of *Thorley's Cattle Food Company* v. *Massam* (1) and *Western Counties Manure Company* v. *Lawes Chemical Manure Company* (2).

To my mind, however, no sensible damage, no damage whatever worth an inquiry, or which we ought to permit to go to an inquiry, is traced to this circular. I say so under the correction of the Lords Justices who know the practice of this Division of the High Court so much better than I. Upon the evidence which we have heard to-day we must take it now that the only circular issued which had any effect upon any person is the one that went to Mr. *Baker*. Mr. *Baker* in consequence of it returned certain of the copies of this work, but he had no right to do so, for he had bought them, and could not return them because he had been frightened by an idle threat.

There is, indeed, a scintilla of a case beyond that, because *Baker* says he has no doubt he should have bought more, but that is not to my mind evidence of any sensible appreciable damage such as to justify an action against the Defendants, an action in which the

(1) 14 Ch. D. 763. (2) Law Rep. 9 Ex. 218.

damages given would be, I will not say the contumelious farthing, but possibly a shilling. In such a case I think that the Plaintiffs, whether they get their shilling or not, ought to pay the costs of this action.

I may refer in support of that view to a case very recently decided by the Court of Appeal at *Westminster*. In an action tried before Mr. Justice *Manisty* for slander or libel a verdict was obtained for nominal damages—I believe for a farthing. Mr. Justice *Manisty* said he thought that it was an action which ought not to have been brought, and that, although the plaintiff had obtained a verdict, the defendants ought to have the costs of the action, and his decision was affirmed by the Court of Appeal.

According to that principle it seems to me reasonable and right that the Plaintiffs should pay the costs occasioned by their claim, and receive the costs of the counter-claim.

JAMES and BAGGALLAY, L.JJ., concurred.

JAMES, L.J., then suggested that, as in taxation it would be difficult to apportion the costs, it might be best for the parties to agree that the claim and counter-claim should be dismissed without costs. An order was accordingly taken to this effect, and no costs of the appeal were given.

Solicitors: *William Crook; Bowen May.*

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Ex parte NATIONAL MERCANTILE BANK. *In re* HAYNES.

Bill of Sale—Registration—Description of Grantor—Setting forth of Consideration—Attestation—Explanation to Grantor — Duty of Solicitor—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *ss.* 8, 10.

Sect. 8 of the *Bills of Sale Act*, 1878, requires that the consideration for a bill of sale should be truly stated in it, as it would properly have been stated independently of the Act. But it does not require that a collateral agreement between the grantor and grantee as to the application of the consideration should be set forth.

Per Baggallay, L.J., *Ex parte Carter* (1) questioned.

Sect 10, though it requires that the attestation clause shall state that the effect of the bill of sale has before its execution been explained by the attesting solicitor to the grantor, does not require that any such explanation should have in fact been given.

Semble, that a solicitor who stated in the attestation clause to a bill of sale that he had explained the effect of it to the grantor when he had not in fact done so, would be liable to civil and penal consequences.

THOMAS HAYNES, who resided at *Chelsfield Hall Farm*, near *Orpington, Kent*, where he carried on the business of a farmer, having filed a liquidation petition in the *Croydon* County Court, the trustee in the liquidation applied to the Court for an order declaring a bill of sale, which the debtor had executed on the 3rd of March, 1879, to be void as against the trustee on the ground that the provisions of the *Bills of Sale Act*, 1878, had not been complied with.

The bill of sale was executed in favour of the *National Mercantile Bank*. In it the grantor was described as "of *Chelsfield Hall Farm, Orpington*, in the county of *Kent*, farmer and auctioneer." It contained a recital that *Haynes* had applied to the bank to advance him £2050, which the bank had agreed to upon having the repayment thereof, together with the further sum of £205, the amount of bonus and expenses attending the advance, secured in manner thereinafter expressed, and it was witnessed that "in consideration of £2050 by the mortgagees paid to the mortgagor at or before the execution thereof," *Haynes* thereby assigned to the

(1) 12 Ch. D. 908.

bank by way of mortgage his furniture, fixtures, household effects, live and dead farming stock, growing crops, utensils and implements of husbandry, and other goods, chattels, and effects belonging to him and then being in and about the dwelling-house, farm, and premises known as *Chelsfield Hall Farm*, together with his tenant right and interest in the farm. The execution of the deed by *Haynes* was attested by two witnesses, one of whom was a solicitor and the other a cashier to the bank, and in the attestation clause the attesting witnesses declared that before the execution of the bill of sale by *Haynes* the effect thereof was duly explained to him by the attesting solicitor. The deed was duly registered under the provisions of the Act. The affidavit on the registration was made by the bank cashier who had attested the execution, and it stated that *Haynes* resided at *Chelsfield Hall Farm, Orpington*, and was a farmer and auctioneer.

The farm comprised about 300 acres, and *Haynes* had occupied it for about four years.

The validity of the bill of sale was objected to on three grounds.

(1.) That the residence and occupation of the grantor were not truly stated in the affidavit made in the registration.

Haynes had formerly carried on the business of an auctioneer at 64, *King William Street, London*, but he had discontinued it for about two years, though he still retained his office and kept his name up there on a brass plate as an auctioneer. He had also carried on at the same place for many years a bill discounting business, and it was alleged that he was still carrying on that business at the time when the bill of sale was executed, and that he ought to have been also described as a bill discounter. On the evidence it appeared that during the greater part of the last year before the petition, *Haynes* had not discounted any new bills for want of funds, but he attended daily at his office and renewed many old bills as they fell due.

(2.) That the effect of the bill of sale was not fully explained by the attesting solicitor to *Haynes* before he executed it. *Haynes* deposed that he was not informed of one of the most material provisions of the deed.

(3.) That the consideration for the bill of sale was not truly set

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forth in it. When the bill of sale was executed on the 3rd of March, 1879, a cheque for £2050 was drawn in favour of *Haynes* by Mr. *Cochrane*, the managing director of the bank. The cheque was cashed by the bank, and in payment of it there were handed to *Haynes* £1500 in bank notes and a bag containing £550 in gold. The bag of gold was at once handed back by *Haynes* to the bank for the purpose of meeting two promissory notes and a bill of exchange which he had previously given to the bank. The first of the notes was for £157 and was dated the 9th of December, 1878, and it fell due on the 9th of March, 1879. It was given in respect of an advance of £150 made by the bank to *Haynes*, and the £7 represented the interest. The second note was for £365 and was dated the 10th of January, 1879, and it fell due on the 10th of April, 1879. It was given in respect of an advance of £300 made by the bank to *Haynes*, and the £15 represented the interest. The bill of exchange was a three months' bill for £50, and was dated the 18th of December, 1878. It was given in respect of an advance of £50 made by the bank to *Haynes*. The £550 was to repay the principal of the three loans. When the bag of gold was handed back to the bank, *Haynes* also had a bank note for £100, one of those which had been handed to him, changed and paid the bank £33, which was made up of the £7 interest on the £150, the £15 interest on the £300, and some expenses connected with the bill of sale. When the bank consented to make the advance of £2050, *Haynes* had agreed that the amounts of the three promissory notes and the bill of exchange should be paid out of it.

The Judge of the County Court declared the bill of sale void as against the trustee. The bank appealed to the Chief Judge.

The appeal was heard on the 19th and 26th of January, 1880.

Winslow, Q.C., and *Robson*, for the Appellants, cited *Ex parte Carter* (1); *Ex parte National Deposit Bank* (2); *Smith* v. *Cheese* (3); *Bath* v. *Sutton* (4); *Tuton* v. *Sanoner* (5); *Ex parte Reed & Steel* (6); *Ex parte Harris* (7).

(1) 12 Ch. Div. 908.
(2) 26 W. R. 624.
(3) 1 C. P. D. 60.
(4) 27 L. J. (Ex.) 388.
(5) 3 H. & N. 280.
(6) Law Rep. 14 Eq. 586, 593.
(7) Law Rep. 8 Ch. 48.

Hemming, Q.C., and *R. Vaughan Williams*, for the trustee, were not heard.

BACON, C.J.:—

It appears to me, upon the evidence, that the debtor was unquestionably a bill discounter up to and beyond the time when the transaction in question took place. The statute, as I have had occasion to say more than once, is in terms extremely strict and clear. It requires the residence and occupation of the person making the bill of sale to be distinctly stated. Reference has been made to cases from which, catching up some words dropped by the Judges, it has been contended that all that is necessary is to state the primary occupation. The statute says nothing about a primary occupation. It speaks of the occupation in which the debtor is engaged, and it applies here much more pointedly and distinctly than in the cases which have been referred to. This man was in all senses a trader, a bill discounter, at the time of the transaction with the Appellants. I feel myself obliged in construing this Act to deal with it with the utmost strictness. The case of *Smith* v. *Cheese* (1) was one in which a man who had been a clerk, and had no other occupation in the world, had called himself a gentleman, and that was held to be a sufficient description. What else was he? Labourer or yeoman he was not. There was no other name by which he could call or designate himself. That is not the case before me. I am of opinion that the judgment of the County Court Judge was perfectly right, and that the bill of sale is invalid, because the provisions of the Act of Parliament in all their strictness, and strictness is requisite, have not been complied with.

The only other point necessary to mention is with regard to that which took place when the loan was negotiated and consummated by the advance of the money. Mr. *Cochrane's* story is that when the application was first made to him for a loan, it was for £3000; and that the borrower then promised, with the advance which he then solicited, to take up the current bills which were in the hands of the bank. That application was not in those terms

(1) 1 C. P. D. 60.

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acceded to. The bank said, "We will lend only £2000;" but the original term that, out of the money lent, the bills were to be paid, was never departed from. What signifies the manner in which the comedy was acted, in the back parlour, or wherever it was? What signifies it that the £550 was brought in a bag, and a note changed, and a cheque formally given for the whole amount? What passed is thus described by the borrower (I do not say he used the exact words), "That which I promised to do, I will do. Bring me my bills and I will discharge them now out of the money you have lent me." That I take to be the plain transaction. Mr. *Winslow* suggested what the witness does not himself say—that, being desirous to guard against the accidents of carrying so large a sum of money home with him, he thought it better to pay off the debt which he owed then and there. That may have been a reason. But where do I find any sort of reason to induce me to doubt that from beginning to end the bargain was, "Lend me the money and I will take up the bills." The money was lent; the bills were taken up. All the precautions that were taken, of drawing the cheque in form, of going to the till and taking out £550 in gold in a bag,—all that I take to be acting; all that does not alter the real transaction between the parties. The contract was, "Lend me the money, and out of it I will take up the bills." In my opinion it would be a clear preference; as notorious a preference of these creditors on the part of the debtor as can be well conceived. I should not hesitate to say upon that ground that the transaction is invalid. But on the point of insufficient description, I feel bound to hold that there was a wilful suppression of the business which the grantor was carrying on, whether it was or was not his primary business or his principal means of obtaining his livelihood. I am of opinion, therefore, that the Appellants fail.

C. A. From this decision the bank appealed. The appeal was heard on the 15th and 22nd of April, 1880.

Winslow, Q.C., and *Robson*, for the Appellants:—

The description of the grantor is a sufficient compliance with

sect. 10 of the *Bills of Sale Act*, 1878 (41 & 42 Vict. c. 31) (1). He never carried on a distinct business as a bill discounter; it was only subsidiary to his business of an auctioneer.

[JAMES, L.J. :—Is there any such a business as that of a bill discounter known to the law?]

There is not. After the debtor took the farm he kept up his

(1) Sect. 8 provides that "Every bill of sale to which this Act applies shall be duly attested and shall be registered under this Act, within seven days after the making or giving thereof, and shall set forth the consideration for which such bill of sale was given, otherwise such bill of sale, as against all trustees or assignees of the estate of the person whose chattels, or any of them, are comprised in such bill of sale, under the law relating to bankruptcy or liquidation . . . . shall be deemed fraudulent and void so far as regards the property in or right to the possession of any chattels comprised in such bill of sale which, at or after the time of filing the petition for bankruptcy or liquidation . . . . and after the expiration of such seven days, are in the possession, or apparent possession, of the person making such bill of sale."

Sect. 10 provides that—

"A bill of sale shall be attested and registered under this Act in the following manner:

(1.) The execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor:

(2.) Such bill, with every schedule or inventory thereto annexed or therein referred to, and also a true copy of such bill and of every such schedule or inventory, and of every attestation of the execution of such bill of sale, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same (or in case the same is made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process issued), and of every attesting witness to such bill of sale, shall be presented to, and the said copy and affidavit shall be filed with the Registrar within seven clear days after the making or giving of such bill of sale, in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed:

(3.) If the bill of sale is made or given subject to any defeasance, or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void."

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name at his office in *London* as an auctioneer, and he discounted no new bills, but only kept afloat the old ones which the acceptors had not paid. Indeed the evidence shews that he had entirely discontinued the bill discounting business before the bill of sale was executed. The debtor's principal occupation was stated, and the Act was sufficiently complied with: *Ex parte National Deposit Bank* (1); *Tuton* v. *Sanoner* (2); *Smith* v. *Cheese* (3); *Luckin* v. *Hamlyn* (4); *Ex parte Harvey* (5). There is no evidence that the debtor was ever described in any directory, or on his business cards, or in any other way as a bill discounter. As to the statement of the consideration, sect. 8 of the Act has been complied with. There was no binding agreement to pay the bill and the promissory notes out of the money advanced. The whole of the £2050 was handed to the debtor, and he could have taken it away and employed it in any way he pleased. The taking up of the bill and the promissory notes was a voluntary act. But even if there was an agreement which could have been enforced by the bank to pay the bill and the promissory notes out of the money advanced, still the consideration for the bill of sale was the whole of the advance. The Chief Judge did not really hold that the consideration had been misstated, but he thought that the payment of the bill and the notes was a voluntary preference of the bank. But no such case was raised by the trustee's notice of motion, and moreover the payment was made more than three months before the filing of the liquidation petition, and cannot therefore be impeached under sect. 92.

As to the amount of explanation by the attesting solicitor, sect. 10 does not require that any explanation should be given: *Hill* v. *Kirkwood* (6). The decision of the Common Pleas Division in *Davis* v. *Goodman* (7) has been reversed by the Court of Appeal (8).

Hemming, Q.C., and *R. Vaughan Williams*, for the trustee:—

Most of the debts which have been proved in the liquidation

(1) 26 W. R. 375, 624. WNC 5/85.
(2) 3 H. & N. 280.
(3) 1 C. P. D. 60.
(4) 21 L. T. (N.S.) 366.
(5) 2 Mont. & A. 593.
(6) 28 W. R. 358. WN (1880) 22
(7) 5 C. P. D. 20.
(8) Ibid. 128.

have been proved by *London* creditors in respect of money lent to the debtor in *London*. This shews the importance of the description of the debtor given in the affidavit made on the registration of the bill of sale being one which would enable the *London* creditors to identify the maker of the bill of sale as their debtor. The question always is whether the description given will in substance bring the identity of the grantor to the minds of the persons who are dealing with him: *Larchin* v. *North Western Deposit Bank* (1). The description of the grantor as a farmer would not identify him to his *London* creditors. The mere fact that he discounted no new bills did not amount to a discontinuance of the bill-discounting business. A man would not cease to be a cotton manufacturer because he bought no new cotton, but only worked up cotton which he had already bought. The only reason why he discounted no new bills was that he had no money; he did not abandon the business. It is quite enough if he might have made a profit by it. A man does not cease to be a merchant, because he declines to buy a new cargo, or to make a new venture.

As to the consideration, it is clear from the evidence that there was a distinct understanding that the consideration of the bill of sale was to be £1500 and the current notes and bill, not £2050. The placing of the bag of gold before the debtor was a mere farce; it was taken back at once by the bank, and he never had any control over it, nor ever knew how much was in it. In *Ex parte Carter* (2) a much smaller departure from the truth was held to be a violation of sect. 8.

[JAMES, L.J.:—Suppose I agreed to buy a horse for £200, and that the purchaser should give me back £50 which he owed me for a pony I sold him the week before, would not £200 be the real consideration for the sale of the horse?

BRAMWELL, L.J., referred to *Hamlyn* v. *Betteley* (3).]

In the case the £50 is a present debt, but the bill of exchange and the promissory notes were not due when they were taken up. The object of the Act is that the consideration should be truly stated, and if there is any collateral bargain between the

(1) Law Rep. 10 Ex. 64. (2) 12 Ch. D. 908.
(3) 5 C. P. D. 327.

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grantor and grantee as to the way in which the consideration is to be applied, that bargain ought to be stated. This is clearly within the mischief of the Act. There is a great difference between a man in difficulties (and it must be assumed that a man who gives a bill of sale of all he possesses is in difficulties) getting an actual advance of cash and getting an old debt released, and, *à fortiori*, if the debt be one which is not yet actually due. Indeed it may be said that a collateral bargain as to the application of the consideration is a condition or declaration of trust within the meaning of sub-sect. 3 of sect. 10, and ought therefore to be set forth.

As to the want of explanation by the attesting solicitor, how can it be said that a bill of sale has been duly attested if the attesting solicitor has not done that which he states that he has done? The Legislature could not have intended that a mere farce should be enacted; it must have intended that the statement in the attestation clause should be true. The decision of the Common Pleas Division in *Davis* v. *Goodman* (1) was overruled by the Court of Appeal only on the ground that sect. 8 of the Act does not make a bill of sale void as between grantor and grantee if the requirements of the Act have not been complied with. It decides nothing in a case between the grantee and a trustee in liquidation. The decision that the solicitor who attests is to explain the bill of sale to the grantor remains unaffected by the decision of the Court of Appeal.

JAMES, L.J.:—

I am of opinion that the judgment of the Chief Judge ought not to be affirmed. Three points have been made. The first is the alleged misdescription of the grantor. He described his residence perfectly accurately—he gave the only residence he had—and he described himself as a farmer and auctioneer. Beyond all question that was substantially and practically the only business which he was carrying on. He was not merely occupying a farm for his amusement. Farming was his occupation in life, the thing by which he was minded to obtain, and was endeavouring to obtain his living, and in respect of which he was

(1) 5 C. P. D. 20.

contracting debts. He had formerly been an auctioneer, and had his name up as such at an office in *London*. It is said he ought also to have described himself as a bill discounter. I really do not know what that is. The business of a bill broker is known to the law, and so is that of a banker, and they discount bills. So do a good many other persons, tailors for instance. But bill discounting is not a trade known to the law. It is not mentioned, so far as I know, in any trade directory, nor is it included in the definition of trades in any of the Bankruptcy Acts. Nevertheless, bill discounting might be a man's occupation in life, and certainly at one time this debtor endeavoured to make a profit by discounting bills. But upon the evidence I am satisfied that the whole thing had come to an end before the bill of sale was executed. In order to be a bill discounter a man must have either cash or credit, and the debtor's cash was exhausted and his credit was exhausted months before the execution of the bill of sale. All he was then doing was this—there being bills which he had discounted outstanding in the hands of the bankers who had given him credit, upon which bills he was liable to the bankers, when they were about to become due he obtained from his customers renewed bills, which he could take to the bankers in substitution for the old ones. Practically, all that he was then doing was to obtain renewals of these old bills in order to avoid being pressed by the bankers. For all practical purposes he was not carrying on the business of a bill discounter, it was not his business, he was not making any profit by it. It seems to me, therefore, that he cannot be said to have misdescribed either his residence or his occupation.

The next point is this, it is said that all the provisions of the bill of sale were not fully explained to the grantor before he executed it. This point came before us recently in the case of *Hill* v. *Kirkwood* (1), though it did not then require actual decision. What sect. 10 of the Act requires is this, that the execution of the bill of sale "shall be attested by a solicitor, and the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor." But that provision is not accompanied by any

(1) 28 W. R. 358.

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enactment, express or implied, that the neglect of the solicitor to perform the duty which he says he has performed—his neglect fully to explain the provisions of the deed to the grantor—that this omission shall render the bill of sale void as against the grantor, or as against any other person. That the omission will not render the deed void as against the grantor has been already decided by the Court of Appeal in *Davis* v. *Goodman* (1). If the deed is not made void as against the grantor, of course it is not void as against any person claiming through him, unless there is some statutory provision which places such a person in a different position from him. By sect. 8 it is enacted that as against some persons claiming through the grantor—the trustee in his bankruptcy or his execution creditors—certain violations of the provisions of the Act shall render the bill of sale void; that is clearly expressed. But there is no such provision in respect of the omission of any of the things required by sub-sect. 1 of sect. 10, and it is not for this Court, or for any Court, to introduce into an Act of Parliament an enactment which is not to be found there merely because we may think that it would be a logical addition to the Act. I do not mean to say that I think that the provision which it is suggested we ought to imply would be a logical addition, for I think that all the Act was intended to require was that a solicitor should attest the execution of the bill of sale by the grantor, and that the attestation should state that the effect of the deed had been explained to the grantor by the solicitor. The Legislature thought that they would give to the grantor the protection of a solicitor pledging his word to the fact that he did give the explanation. The protection may not in all cases be an effectual one, but I think it is all which the Legislature meant to give. A solicitor is an officer of the Court, and is liable to serious consequences if he neglects his duty. He is liable to an action by his client, as well as to proceedings of a penal character. I am of opinion that when there is such an attestation the provisions of the Act are fully complied with, and that the validity of the bill of sale is not affected by the omission of the attesting solicitor to give the explanation which he says that he has given.

The third point is the alleged omission to set forth in the bill

(1) 5 C. P. D. 128.

of sale the consideration for which it was given. Of course, if the consideration is to be set forth in the bill of sale, it must be set forth truly; probably it need not be stated with minute accuracy, but it must be set forth substantially. In my opinion the consideration for the bill of sale in the present case was really the advance of £2050, which was lent by the bank to the grantor. Mr. *Roland Williams,* in his very able argument, contended that any collateral stipulations as to the application of the consideration ought to be set forth as part of the consideration; that there should be recitals of the intended application of the consideration. I cannot see that recitals of the motive and object of the advance are required by the Act. The motive of the lender, as it seems to me, is no part of the consideration for the deed, though it may be a collateral inducement to him to make the advance. Suppose that, instead of there having been bills due by the grantor to the bank, there had been outstanding in the hands of some other bank bills upon which the lenders were liable, and they had said to the grantor you must take up those bills; or, suppose a loan were made upon the security of farming stock, and the lender said, "You must pay the rent which is due to your landlord, or my security will be seriously prejudiced." Stipulations of that kind would be part of the bargain between the parties, but they would be no part of the consideration which is intended by the Act to be set forth. The Act requires the real, the actual consideration to be set forth, but it does not require that any bargain between the parties relating to it should be stated. Of course, if there was a bargain that the whole sum which is stated to be the consideration should be at once returned to the grantee, that would be a sham transaction, and the Court would know how to deal with it. But where there is a bargain that a part of the sum stated to be advanced shall be applied in the payment of a real debt due at the time from the grantor to the grantee, there is no reason for calling that a sham transaction, or for holding that the Act applies to it. The Chief Judge characterized what took place in the present case as a comedy, but I can see no reason for so describing it. In cases of payment for shares in a company, we have frequently held that where there is a debt due from the company to the shareholder, and a debt for calls on shares due from him to

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the company, it is not necessary to go through the form of handing over the money and then handing it back again, but that the one debt may be set off against the other. But the going through that form cannot make the transaction any the worse, and that is really what was done in the present case. In my view, the real consideration, as between the grantor and grantee, the consideration which would have been properly stated in the deed if the Act had not been passed, is the consideration which ought now to be stated. And in my opinion that is the consideration which has been stated in the present case.

BAGGALLAY, L.J.:—

The Chief Judge has held that this bill of sale is void as against the trustee in the liquidation of the grantor, and from that decision this appeal is brought. If I rightly understand his judgment, he based his decision on three distinct grounds: 1. That there had been a misdescription of the residence and occupation of the grantor; 2. That no explanation of the effect of the deed was in fact given to the grantor by the solicitor who attested his execution, though the attestation states that the explanation was given; 3. That the consideration for the deed is not truly stated in it. With regard to the first point, the provision in sub-sect. 2 of sect. 10 of the Act of 1878, as to the description of the residence and occupation of the grantor, is not a new one; it was contained in the Act of 1854 in the very same words. The meaning of the word "occupation" in that Act was the subject of discussion in *Luckin* v. *Hamlyn* (1). In that case *Kelly*, C.B., said that the word "occupation" in the Act "means the trade or calling by which the maker of the bill of sale ordinarily seeks to get his livelihood." And *Martin*, B., said, "The word 'occupation' in this Act means the business in which a man is usually engaged to the knowledge of his neighbours. The intention is, that such a description should be given that, if inquiry be made in the place where the person resides, he may be easily identified." There can be no question here that the grantor's residence was properly described, and that his occupation was properly stated as a farmer. But it is objected that he ought also to have been described as a

(1) 21 L. T. (N.S.) 366.

bill discounter. I need not repeat what Lord Justice *James* has said about the evidence as to the bill discounting. It appears to me impossible to say that the debtor obtained his livelihood by bill discounting, or that he was carrying on the business of bill discounting at the time when the bill of sale was executed; it was not within his power or his pecuniary means to do so at that time. Whether the bill discounting is an "occupation" within the meaning of the Act, is a question upon which I do not desire to express any opinion; it is certainly not mentioned among the trades specified in the schedule to the *Bankruptcy Act*, 1869. It is suggested that the addition of the word "auctioneer" in the description was misleading. But an auctioneer is a trader within the *Bankruptcy Act*, and at that time the grantor had his name up as an auctioneer on a brass plate at the office in *London* which he occupied.

As to the second point, there is an attestation clause to the bill of sale, one of the attesting witnesses is a solicitor, and the clause states that before the execution of the deed by the grantor, the effect thereof was duly explained to him by the attesting solicitor. If so, all that the Act requires to be done has been done, and we should not be justified in going behind the Act and inquiring whether any explanation was in fact given, and what the nature of the explanation was. This provision was intended for the benefit of the grantor, and it may well be that if no explanation, or an insufficient explanation, was given to him, the solicitor would be liable to an action by the grantor, and to other consequences.

As to the third point, the statement of the consideration, I confess I am hardly able to follow Mr. *Williams*' ingenious argument. No doubt the consideration for the bill of sale was £2050, and it seems to me immaterial that £550, part of that consideration, was applied, and was agreed to be applied, in taking up the bill of exchange and the notes on which the grantor was liable to the grantee. *Ex parte Carter* (1), on which Mr. *Hemming* relied, was a very different case from the present, though I think it right to say that, as at present advised, I am by no means satisfied that I should have agreed with the decision in that case.

(1) 12 Ch. D. 908.

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BRAMWELL, L.J.:—

I am of opinion that the judgment of the Chief Judge cannot stand. With regard to the objection that the effect of the bill of sale was not sufficiently explained to the grantor, I am of opinion, paradoxical though it may seem, that the statute does not require that any explanation should be given. All it requires is, that there shall be an attestation clause which shall state that before the execution of the deed its effect has been explained to the grantor by the attesting solicitor, and I think it meant nothing more. I do not think the Legislature intended that provision for the benefit of the grantor; I hope they did not, for I think they have taken a great deal too much care of people who are able to take care of themselves. The title of the Act is, "An Act to consolidate and amend the law for preventing frauds upon creditors by secret bills of sale of personal chattels." I think the object of the Legislature in requiring that the execution of a bill of sale should be attested by a solicitor was this, to prevent the grantor from being made a party to a fraud upon his creditors,—that the enactment was intended for the protection of creditors, and the object was to secure the presence of an intelligent man when the execution takes place. Sect. 8 requires that a bill of sale shall be duly attested and shall be registered under the Act, and if this is not done it is to be void as against creditors in certain events. It is not made void as against the grantor. A bill of sale without any attestation or registration would be good as against the grantor. I think that the provision as to attestation was introduced for the benefit of creditors, and that all that was intended was to secure the presence of a solicitor at the time of the execution, and by requiring that the attestation clause should state that the effect of the deed had been explained to the grantor, to have a reasonable assurance that the explanation had been given. If any other construction were to be put on the section the consequences would be shocking. The validity of every bill of sale might be called in question, when the grantor had become a bankrupt, by his coming forward and saying that the effect of it was not fully explained to him before he executed it. I am of opinion, therefore, that, paradoxical as it may seem, the Act does not require that any explanation should be given to the grantor.

The next question is the alleged misdescription of the grantor's occupation. So far as I know, bill discounting is not a definite trade, but if a man were to get his living in that way and in no other, I think he ought to state it as his occupation. Probably he need not state it if it was only ancillary to some other business. But, as a matter of fact, in the present case the grantor was no more a bill discounter when the bill of sale was executed, than a man who had given up farming would be a farmer.

As to the consideration, I have felt a good deal of difficulty, but on the whole my opinion is unfavourable to the argument of Mr. *Williams*. The transaction, I take it, was in substance this: The bank said, "You are to have £1500 and your old bills, but the best way of doing this will be for us to give you £2050, and then for you out of that sum to pay us the amount of the bills." Those, as I hold, are the facts. Why they did it in that way I do not exactly know, but I think I can guess. These bills of sale are in a printed form, and they did not want to take the trouble to alter the form. However, that is what I hold to have been the transaction. Although, in a certain sense, the borrower could have gone away with the £2050, and the bank could not have stopped him, but could only have brought an action against him, still I think there was a bargain, to use his own words, that he should go away with only the £1500. But, as Lord Justice *James* has already said, what the Act means is this, that that which you could truly have said was the consideration for the deed before the Act was passed you should still state as the consideration; if the statement would have been accurate before, it will be accurate still. Take the case of a bill of sale of farming stock, given for £100, there being an agreement that out of the £100 the grantor should pay the grantee £40 which he owes him for a particular horse which he had purchased of him, is it conceivable that the Act would require that the agreement to pay for the horse should be stated in the deed? In that case £100 would clearly be the consideration for the bill of sale. So here £2050 was the consideration. There could not be a stronger illustration than that which was put by Lord Justice *James*, of an agreement that out of the money advanced by the grantee the grantor should pay the rent which was due to his landlord. If all that is

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necessary to do is to state honestly that which would properly have been stated before the Act, I think that enough has been stated in the present case. But I do not feel so confident on this point as on the others.

It is sometimes said that the *Bills of Sale Act* is badly treated, and that attempts are constantly made to escape from it. No doubt that is so, and attempts will always be made to escape from every Act which is drawn in that hard and fast way. If the Act had been drawn in what I may call a more lenient form there would have been more inclination to enforce it rigorously. But the rigorous execution of a rigorous Act is really too much.

Solicitor for Appellants: *J. J. Irving.*
Solicitors for Trustee: *Ashurst, Morris, & Co.*

ASTLEY *v.* MICKLETHWAIT.

V.-C. M.
1880
June 30.

[1877 A. 46.]

Contingent Remainders—Legal Estate in Mortgagee—Remainders preserved.

A testator devised a freehold estate to the use of his son for life, and after his decease to the use of the children of his son who should attain twenty-one or die under that age leaving issue, and the heirs and assigns of such children, in equal shares. The testator had mortgaged part of the devised estate, and at his death the legal estate was outstanding in the mortgagees. The testator's son died leaving four infant children :—

Held, that as to the mortgaged portion of the estate the contingent remainders were preserved from failure by the legal estate outstanding in the mortgagees, but as to the remaining unmortgaged portion, the remainders failed on the death of the testator's son.

Festing v. *Allen* (1) commented on.

FRANCIS L'ESTRANGE ASTLEY, by his will, dated the 25th of August, 1862, after executing a power of appointment given him by the settlement made upon his first marriage in favour of the two children by his first marriage, *Charlotte Laura Astley* and *Francis Nathaniel Astley*, and after executing a power of appointment given him by the settlement made upon his second marriage in favour of the children by that marriage, subject to the life interest of his wife, gave and devised all his messuages, lands, tenements, and hereditaments in the county of *Norfolk*, called or known as the *Saxthorpe* estate, to the use and intent that his wife, *Rosalind Alicia*, might, during the joint lives of herself and the testator's son, *Frederick Bernard Astley*, receive a yearly rent-charge of £280 to be charged and payable out of such estate, and, subject and charged as therein mentioned, to the use of Lord *Walsingham*, *Frederick Nathaniel Micklethwait*, and *Jasper Henry Selwyn*, their executors, administrators, and assigns, for the term of 500 years, to commence from the death of the testator, upon the trusts thereinafter declared; and from and after the expiration or determination of the said term of 500 years, and subject to the trusts thereof, to the use of his son *Frederick Bernard Astley* and his assigns during his life,

(1) 12 M. & W. 279.

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without impeachment of waste, and from and after his decease to the use of all or such one or more exclusively of the others or other of the children of *Frederick B. Astley* who being a son or sons should attain the age of twenty-one years or die under that age leaving issue him or them surviving, or being a daughter or daughters should attain that age or be married, for such estates and interest as his said son should by deed or will appoint, and in default of such appointment to the use of the child or all the children of his son *Frederick B. Astley* who being a son or sons should attain the age of twenty-one years or die under that age leaving lawful issue him or them surviving, or being a daughter or daughters should attain the age of twenty-one years or be married, and the heirs and assigns of such children respectively in equal shares if more than one as tenants in common. But if his said son should die without having had any son who should have attained the age of twenty-one years or should have died or should afterwards die under that age leaving lawful issue him surviving, or any daughter who should have attained or should afterwards attain the age of twenty-one years or should have been married, then, subject and without prejudice to the power of appointment lastly thereinbefore contained, to the uses therein mentioned. And the testator, after other devises, gave and devised to his son *Francis Nathaniel Astley*, his heirs, executors, administrators, and assigns, all his freehold, copyhold, and leasehold hereditaments not otherwise disposed of by his will.

The testator died in April, 1866, and his will was proved by *F. N. Micklethwait* and *Jasper Henry Selwyn* alone, the said Lord *Walsingham* having renounced probate and execution of the will.

The *Saxthorpe* estate, devised by the will, was wholly of freehold tenure; it contained about 1382 acres, and was acquired by the testator by two separate purchases. By one he acquired the bulk of the estate, containing about 1323 acres, and by the other he acquired the remaining fifty-nine acres, or thereabouts. Immediately after the execution of the conveyances of this estate the testator mortgaged the bulk of the *Saxthorpe* estate, containing the 1323 acres, to the trustees of the first marriage settlement and their heirs, for securing a sum of £20,000 which they had

advanced to him out of the trust funds to enable him to complete the purchase of the estate, and he executed a second mortgage of the same portion of the estate to the trustees of the settlement upon his second marriage to secure a sum of £1500 which they had advanced to him out of the trust funds to enable him to complete his said purchase. The latter sum of £1500 had since the testator's death been paid off out of his personal estate, pursuant to directions in that behalf contained in the will, and the second mortgage had thereby become satisfied.

Frederick Bernard Astley, the testator's son, died in August, 1876, leaving four children, the infant Plaintiffs, the eldest of whom was born in January, 1868, and he did not exercise the power of appointment of the *Saxthorpe* estate in favour of his children given him by the will.

The testator's son *Francis Nathaniel Astley*, the residuary devisee, and who was also his heir-at-law, died in August, 1868, intestate, leaving *Francis Jacob Astley* (an infant) his eldest son and heir-at-law and the heir-at-law of the testator.

Francis Jacob Astley claimed to have some estate or interest in the *Saxthorpe* estate or some part thereof.

This action was instituted to have the rights and interests of the several persons entitled or interested under the will of *Francis L'Estrange Astley* in the *Saxthorpe* estate declared, and to have the trusts of the will as to the *Saxthorpe* estate carried into execution.

Glasse, Q.C., and *Chapman Barber*, for the children of *Frederick Bernard Astley* :—

The limitation to the children of *Frederick Bernard Astley* is upon the face of the will a contingent remainder, and, inasmuch as the children were at his death all minors, there was no person answering the description to take under the limitation. We admit, therefore, that as to the unmortgaged portion of the property, consisting of about fifty-nine acres, in which the testator had the legal estate in fee, the contingent limitation and all the subsequent limitations of the estate must fail. That comes within the case of *Festing* v. *Allen* (1), as well as *Holmes* v. *Prescott* (2) over-

(1) 12 M. & W. 279; 5 Hare, 573. (2) 10 Jur. (N.S.) 507.

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ruling *Browne* v. *Browne* (1), *Cunliffe* v. *Brancker* (2), and other cases there referred to; but as regards the portion of the estate consisting of 1323 acres, there the legal estate was outstanding in the mortgagees, and we contend that the contingent limitation was preserved. If the testator had devised the fee simple to trustees, or if the legal estate in fee had been outstanding in trustees for him, the contingent limitation would have been preserved—that is laid down in *Fearne's* Contingent Remainders (3) and *Butler's* Note, *m*, but it does not appear that there is any actual decision that the same consequence follows from the legal estate being outstanding in mortgagees. We say that this fact is sufficient to take the case out of the old feudal rule.

J. Pearson, Q.C., and *Owen*, for the heir-at-law of the testator:—

Our contention is that the legal estate outstanding in the mortgagees will not support the remainders, because it is subject to be reconveyed to the uses of the will. If the mortgage is paid off, the legal estate will have to be reconveyed. There is a note upon this subject written by the late Mr. *Waley* in *Davidson's* Conveyancing, in the volume on Settlements (4), in which, after citing the note in *Butler's* Contingent Remainders (5), he says: "When, as is not uncommonly the case, the legal estate is outstanding in a mortgagee, and the equity of redemption is settled exactly as if it were a legal estate, it is difficult to suppose that upon a reconveyance the equitable estates are not, to all intents and purposes, clothed with the legal estate so as to be converted into a corresponding system of legal limitations and powers; and on the other hand, it would be difficult to reconcile with other legal analogies the opinion that if, in the case supposed, the equitable remainders had the character of indestructibility and independence of support, they would upon a reconveyance lose that character by consolidation with the legal estate." The mortgage is always liable to be paid off; the mortgagee is not bound to keep the mortgage on foot for the benefit of the parties, and if he chose to call it in, his duty would be to reconvey the legal

(1) 3 Sm. & Giff. 568.
(2) 3 Ch. D. 393.
(3) Page 304.
(4) Page 265.
(5) Page 305, note (*m*).

estate to the uses of the will, which is the common form of conveyance in such cases.

[MALINS, V.C.:—The rule is that when there are contingent remainders depending upon a legal estate, the failure of the legal estate destroys the contingent remainders, but it is not so with equitable estates. There is the celebrated case of *Hopkins* v. *Hopkins* (1), which distinguishes the two. How would it be in this case? Suppose this testator, having the legal estate, had devised the estate unto and to the use of his trustees, their heirs and assigns, to hold upon trust for his son for life, and after his decease to the children, just as it is here, to the sons who should attain twenty-one and daughters who should attain twenty-one or marry?]

In that case there would be no contingent remainder. The question may be answered by a passage from Mr. *Joshua Williams'* book on Seisin (2), where the author says: "Now if the testator, instead of creating legal estates by means of single uses, had created a use upon a use, and had vested the whole property in the trustees by simply giving it to them and their heirs, to the use of them and their heirs upon trusts of a similar nature, equity would have preserved the contingent remainders to the children; and on their coming of age they would have been entitled to the land." But that is not the case here, where there are a series of legal limitations created. What the testator really had was the equity of redemption, the legal estate being outstanding. But suppose between the date of the will and the time of the testator's death he had paid off the mortgage and taken a reconveyance to himself, then he would have had the legal estate.

MALINS, V.C.:—The testator had not the legal estate at the date of his will or death. His will never operated upon the legal estate. Why am I to go out of my way to destroy the will instead of preserving it? Anything that would enable the Court to get out of the monstrous doctrine of *Festing* v. *Allen* (3) ought to be adopted. You cannot have a more forcible illustration than this very case.

(1) Cas. t. Tal. 44. (2) Page 201.
(3) 12 M. & W. 279.

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MALINS, V.C., after reading the material parts of the will, continued:—

In a recent case of *Patching* v. *Barnett* I have expressed my dissent from the principles acted on in the case of *Festing* v. *Allen* (1), and I equally express my dissent from them here; but as I said there, so I say here, *Festing* v. *Allen* has become a binding authority upon me, although I think it wrong upon principle. If these had been legal limitations it would have been exactly the case of *Festing* v. *Allen*, and I should be bound on the authority of that case to say that the limitations to the grandchildren of the testator, that is, to the children of *Frederick Bernard Astley*, failed, because the father died while they were under twenty-one, which was the very event which happened in *Festing* v. *Allen*, where the limitation was to the granddaughter of the testator for life, and after her decease to her children who should attain twenty-one. She died while they were minors, and therefore the estate, saving contingent remainders, having failed, and they not being capable of taking effect at the latest moment at which they could take effect, namely, at the expiration of the particular estate, failed altogether, as they would have done in this case had they been legal limitations. But it happened, fortunately I think for all parties, that in this case the legal fee was not in the testator. If he had had the legal fee, and had devised it to the trustees in this way, "I give all my lands unto and to the use of my trustees, their heirs and assigns," and then these same limitations had been repeated, they would have been contingent remainders, but they would have been contingent remainders which would have been preserved by the legal estate in the trustees. That, I think, nobody seems to doubt, but in this case the testator did not make that form of will, because he had not the legal estate. It was outstanding in a mortgagee as to the whole of the estate except fifty-nine acres, I understand. Mr. *Glasse*, who appears for the Plaintiff, does not contest that as to the fifty-nine acres the case is governed by *Festing* v. *Allen*, and that therefore the limitation as to the fifty-nine acres fails. But with regard to the bulk of the estate, which is 1323 acres, the legal

(1) 12 M. & W. 279.

estate being outstanding, I apprehend the effect is just the same as if the legal estate had been expressly devised by the will.

Now, I believe there is no judicial decision on this point, but certainly that has been my impression for many years, derived from consideration of the subject. It is discussed by Mr. *Butler* in his note on *Fearne*, and also, I think, in the note to *Coke* upon *Littleton*, all pointing to the same conclusion. Mr. *Butler* says: "It is to be observed that *Fearne* speaks in this place of cases where both the legal fee and the trusts are created by the same instrument; but it frequently happens that contingent remainders are created by deed or will after the legal freehold [that is a misprint, because it is legal fee, not freehold] has been vested in some other person by a previous deed or will. No case has been decided to shew that such an outstanding estate will preserve the contingent remainders created by the subsequent deed. The general opinion is that it will; but if the deed vesting the legal fee in the trustee is of a very ancient date, cases may arise, in which it may be doubtful whether the long possession by the *cestui que trust*, without an acknowledgment of the outstanding legal estate, has not, in the presumption of law, divested it from the trustees so as to make it incapable of supporting the contingent remainders, by virtually depriving it of its legal existence."

That is a different point, because that would be a case where the Court would presume a reconveyance of the legal estate; but where, as in this case, the legal estate is undoubtedly outstanding, then the testator devises only equitable estate, and this doctrine of the destruction of contingent remainders has no application, because they are all preserved by the outstanding legal estate; and I am therefore of opinion, on these grounds, that as to the bulk of the estate the limitations are good and will take effect in favour of the children attaining twenty-one.

Glasse, Q.C., referred to the case of *Berry* v. *Berry* (1), where there was a devise of lands to trustees, their heirs and assigns, to the use of *A.* for life, with remainder to the use of such child or

(1) 7 Ch. D. 657.

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children of *A.* as should attain twenty-one; and it was there held that the contingent remainder of the infant child of *A.* was equitable and did not fail by reason of the death of *A.* before the remainder vested. He then said he could not contest that until the child attained twenty-one the rents must go to the heir-at-law. That was decided in *In re Eddels' Trusts* (1).

MALINS, V.C.:—

As to the rents in the meantime, it cannot be disputed that they will go to the residue or to the heir-at-law.

The decree will therefore be that the part of the *Saxthorpe* estate subject to the mortgage passes under the limitations in the will; that the Defendant *Francis Jacob Astley* is absolutely entitled to the part of the estate not subject to the mortgage; and that the Defendant *Francis Jacob Astley* is entitled to the rents of the part of the estate subject to the mortgage until the same vests in possession.

As to the costs, I shall apply the principle I acted upon in *Scott* v. *Cumberland* (2). That seems to me a reasonable rule, and I must hold that the costs are to be apportioned between the specifically devised estate and the residuary estate.

Solicitor for all parties: *Dunster.*

(1) Law Rep. 11 Eq. 559. (2) Law Rep. 18 Eq. 578.

In re GOSMAN.

[1879 G. 165.]

V.-C. M.
1880
June 11.

Will—Administration by Executors—Assignment to the Crown—Claim by Next of Kin—Interest payable by the Crown.

The trustees and executors of a will administered to the property, and upon its being decided in a suit instituted for the purpose that there was an intestacy, and no heir or next of kin being discovered, the trustees assigned the leasehold property to the Solicitor for the Treasury, to be held for the benefit of the Crown. The Plaintiffs, six years afterwards, established their claim as next of kin of the testator, and the Court declared them entitled:—

Held, that the Crown was bound to pay to the Plaintiffs interest at the rate of 4 per cent. upon all the rents and profits received on account of the personalty, just as if the Crown had administered to the estate.

PETITION OF RIGHT.

William Brownlie, by his will, dated the 14th of February, 1862, after giving various legacies, gave, devised, and bequeathed the residue and remainder of his estate, both real and personal, to *J. Hamilton*, the Rev. *T. McCrie*, the Rev. *G. L. Duncan*, the Rev. *C. G. Scott*, and *J. Johnstone*, their heirs, executors, and administrators, and he appointed the same persons executors of his will. The testator died on the 14th of February, 1864, without leaving any heir-at-law, or, as was then supposed, any next of kin. The testator at the time of his death was owner of an undivided share of a freehold house, and was possessed of numerous leasehold houses and of other personal property of very considerable value. After the testator's death the trustees were advised that it was doubtful whether the trusts of the will could be carried out legally, and they, by arrangement among themselves, instituted a suit praying that the rights of all parties might be ascertained.

Upon the case being heard finally by the Court of Appeal on the 22nd of January, 1872, it was decided that the residuary bequest in the will was void by reason of there being a secret trust, that the leasehold property, in default of there being next of kin of the testator, belonged to the Queen, and that possession should be delivered to such person as Her Majesty should by warrant under sign manual appoint.

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In consequence of that decision, by a warrant under Her Majesty's sign manual, dated the 18th of December, 1872, it was directed that the leasehold estate of which the testator died possessed should be assigned to *John Gray*, the solicitor to the Treasury, and by an indenture dated the 31st of May, 1873, made between *John Johnstone*, *Thomas McCrie*, and *Charles G. Scott* (being the three trustees by whom alone the will was proved) of the one part, and *John Gray* of the other part, the said leasehold estate was assigned to *John Gray* as a trustee for Her Majesty.

A petition of right was presented by *James Gosman* on behalf of himself and others on the 2nd of December, 1873, by which the suppliant claimed to be one of the next of kin of the testator *W. Brownlie*, as being his second cousin once removed, and the suppliant prayed that it might be ascertained under the direction of the Court who were then the next of kin of the testator, and upon such next of kin being ascertained, that it might be declared that they were entitled to the leasehold estates of which the testator died possessed. And thereupon that Her Majesty would be pleased to direct by a warrant under her sign manual that the said *John Gray* should reassign the said leasehold estate to the parties so found entitled thereto, and that he should account to the suppliant and other the next of kin of the testator for the several sums of money received by him in respect of the rents of the said leasehold premises prior to the 31st of May, 1873, and also the rents received since that date.

Upon this petition of right coming on to be heard an order was made by the Court, on the 21st of February, 1878, for inquiries according to the prayer, and in pursuance of that decree the Chief Clerk found that *James Gosman* and his brothers *Alexander* and *William Gosman*, and his sister *Rachel Gosman*, and also five persons as the descendants of *Thomas Hay*, the grandfather of the testator, were the only next of kin of the testator *William Brownlie* living at his death on the 14th of February, 1864, being second cousins once removed. A summons to vary the Chief Clerk's certificate came before the Court on the 28th of January, 1879, which was dismissed, and the finding of the Chief Clerk was confirmed.

A question was now raised upon further consideration whether the Plaintiffs were entitled to be paid interest by the Crown for the various sums of money received on account of rents and profits by the Solicitor to the Treasury.

Higgins, Q.C., and *Murray*, for the Plaintiff:—

The next of kin of the testator have now established their right to the personal estate, and they are entitled to have all the money received by the Solicitor to the Treasury on behalf of the Crown handed over to them, and they are also entitled to interest upon the money so received. The Crown is in the same position as every administrator who receives money from a testator's estate, and it was decided in *Attorney-General* v. *Köhler* (1) and in *Edgar* v. *Reynolds* (2) that the Crown must be treated as an ordinary administrator, and that the property must be refunded with 4 per cent. interest. It can make no difference whether the Crown administers to the estate or whether the property is assigned by the administrator to the Crown, the principle is the same, namely, that the person who holds the property has the benefit of it and receives interest upon it. If the Crown received the money it must either have been invested or applied for the public benefit, and under any circumstances there is a profit derived which is a profit belonging to the next of kin, who are entitled to it.

J. Pearson, Q.C., and *Romer*, for one of the next of kin in the same interest.

Rigby, for the Crown:—

There is no doubt that the next of kin, upon coming forward and proving their claim, are entitled to have repayment of the money to them, but they ask for interest upon the money received by the Crown. The ground upon which interest is enforced against ordinary trustees is that it is their duty to invest the money, and if they do not they are in default, but there has been no default on the part of the Crown. In *Edgar* v. *Reynolds* the Crown administered to the estate, and thereby took the liabilities of an

(1) 9 H. L. C. 654. (2) 4 Drew. 269; 27 L. J. (Ch.) 562.

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ordinary administrator, but here there was no administration taken out by the Crown. When no next of kin could be discovered the money was ordered to be paid over to the Crown, and the leaseholds to be assigned to the Crown, and by a warrant under the sign manual of the Queen, Mr. *Gray*, the Solicitor for the Treasury, was appointed to receive the assignment as trustee for the Crown, but it was no part of his duty to invest the money, as if he had been a trustee for persons who might at some future time come forward and claim the estate. There was no case of trusteeship on behalf of the unascertained next of kin. The property had been handed over to the Crown as a matter of right. If money were paid to *John Jones* to be held for *Thomas Brown* there would be no duty devolving upon *John Jones* to invest the money, as he might be called upon at any moment to refund it. There is no duty in the Crown to lay out or invest property on behalf of the next of kin. The next of kin cannot charge the Crown with not doing its duty to them, because there is no duty owing to the next of kin. As a matter of fact these moneys payable to the Crown are never invested, but are paid over for the public service, and no interest is therefore derived from investment; all that the Crown is called upon to do is to protect the property for the next of kin, who, if ever they come forward, have the advantage of receiving the property without loss or diminution.

Malins, V.C.:—

The testator *William Brownlie*, I believe, was a Scotchman. He was a Presbyterian, and he was very desirous of employing his property in building Presbyterian churches and chapels in *London* for the use of the Scotch Presbyterians. He selected five gentlemen as his trustees; and he gave them all his property, real and personal. He imposed no trust upon the trustees in words, but it was suspected by some of the parties interested that there was a secret trust. Accordingly a suit was instituted, and the Court decided that there was a secret trust; the consequence of which was that efforts were made to ascertain whether there were any next of kin. Advertisements were issued and all means were adopted, according to the ordinary course of the

Court, to ascertain who were the next of kin of the testator *William Brownlie;* but no one came forward, and, therefore, there was a finding that there were no next of kin. The testator's will had been proved by the executors, and there was an intestacy as to the beneficial interest of the personal estate, and also an intestacy as to real estate which the testator devised to trustees.

Upon the well-known doctrine of *Burgess* v. *Wheate* (1), where real property is devised to a trustee, and where nobody is found who has a better right to it, he claims it by virtue of his legal estate; and these trustees, therefore, had the advantage of being able to retain all the real estate of the testator. But with regard to the personal estate, the whole of it being leasehold property, the trustees were trustees for the next of kin, if there were any; and if there were no next of kin, they were trustees for the Crown.

It had been ascertained, as was believed, that there were no next of kin, and the Chief Clerk had certified there were no next of kin, and that finding had been adopted.

The consequence was that these gentlemen were trustees for the Crown, the Crown being believed to be entitled to all the leasehold property. If there had been a mere intestacy the Crown would have administered; but there was no occasion for administering, because the legal estate vested in the trustees. So that, instead of there being administration by the Crown, the property was assigned to Mr. *Gray*, the Solicitor to the Treasury, by a royal warrant dated the 18th of December, 1872, and Mr. *Gray* held the property in trust for the Crown. I am told that, at the same time, a sum of about £6000 in cash was handed over to Mr. *Gray*. That, in my opinion, was also in his hands as trustee for the Crown. That sum of £6000 represented the accumulated rents of the leasehold property, to which the trustees knew they were not entitled, but to which the next of kin would have been entitled if they had been in existence.

The accumulated rents of the leasehold property were retained from 1873 to 1879, a period of about six years. If that money had been invested there would have been interest paid upon it; but, instead of its being invested, it was used for the purposes of the nation and for the benefit of the public.

(1) 1 Eden, 177.

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The question, therefore, is, whether the public are bound to pay interest on this sum of £6000 and also on the moneys which arose from the rents and profits of the leasehold property not invested, but, as Mr. *Rigby* says, used for the benefit of the public.

If the principle upon which I have to act had been entirely new, I might have found very great difficulty in coming to the conclusion that the Crown and its successors were bound to pay interest. Of course the usual mode by which the Crown becomes possessed of property of this kind is in consequence of a person dying intestate. If a person is illegitimate, and he dies intestate, the Crown is entitled to everything. That is the usual way in which the Crown gets property. So that if there is money in the Funds or elsewhere the authorized officer of the Crown, namely, the Solicitor to the Treasury, administers to the estate of the deceased person; and then the money comes to the Crown, that is to say, to the representatives of the Crown as administrators.

Now it has been decided over and over again, and it is a settled rule, that whenever the Solicitor to the Treasury has to administer to the estate of a deceased person, and the money is retained, for whatever period it is retained, interest is payable at £4 per cent. That was not only decided in *Attorney-General* v. *Köhler* (1), but it was decided in the case of *Partington* v. *Reynolds* (2), where I find that Vice-Chancellor *Kindersley* ordered payment of a sum of no less than £18,100 as interest on property. There is also the case of *Edgar* v. *Reynolds* (3). There again the Crown was ordered to pay interest on the balance in their hands. Vice-Chancellor *Kindersley* in that case says this: "He has" (that is, the Solicitor to the Treasury) "no right, I apprehend, to have this money wrapt up in a napkin; still less has he a right to keep it in his pocket, where you must assume he is getting the benefit of it." Then again he says: "It is very unreasonable and unjust that the public should have the benefit of those moneys, which is the same thing as if the public was getting interest upon these moneys, or employing it at interest, and then twenty years afterwards, or at any time afterwards, saying to the party who turns out to be beneficially entitled, 'True, we have had the use of

(1) 9 H. L. C. 654. 8 Jur. N.S. 461. (2) 27 L. J. (Ch.) 505.
(3) 27 L. J. (Ch.) 566; S. C. 4 Drew. 269. 4 Jur. N.S. 399.

these moneys, but you ought to have come sooner; and although we have the benefit, you shall have nothing but the dry principal.'"

Now I do not understand these decisions as proceeding simply upon the ground that the money came into the hands of the Solicitor to the Treasury as administrator, but they proceeded upon a broad principle of justice and common sense. The money has been in the possession of the Crown, and the Crown has had the benefit of it by expending it either in reducing the National Debt, or by applying it in the public service, which Mr. *Rigby* says is the course adopted; and if this money has been applied for the benefit of the public, the public will be called upon for so much less from other sources. Taking it, therefore, in any way, it comes to the same thing. The Crown, or rather, the British public have had the advantage of the use of the money, and, having had that advantage, in my opinion they are bound to pay interest upon it, whether it has come to their hands in one way or in another.

Therefore, I entirely dissent from the argument that the Crown is only liable when it takes as administrator. It is liable, in my opinion, on the broad principle that the public have had the use of the money and have had the advantage of the use, while the parties beneficially interested have not had the advantage of it. Therefore, the parties beneficially interested must be compensated in the only way in which the Court can compensate them, namely, by giving them interest.

The case is a peculiar one, because all the advertisements had gone forth without any next of kin coming forward. However, after the Crown had been a long time in possession of this money, this petition of right was presented to me, and it came on for hearing on the 16th of March, 1875, but I should not have made any decree in favour of the suppliant, *James Gosman*, who petitioned on behalf of himself and the other next of kin, unless he had established a *primâ facie* case of his being one of the next of kin; but he having established a *primâ facie* case, I made a decree directing an inquiry who were the next of kin of *William Brownlie*.

The parties have now established their title, and they are found to be the next of kin. A large sum of money has to be

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divided—£18,000, I believe, has already been paid out to them on account, and the residue will now have to be paid.

Therefore there must be an account of the balances from time to time in the hands of the Crown, and interest at £4 per cent. must be paid upon those balances.

Solicitors: *Ewbank & Partington; Hare & Fell.*

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GRAY *v.* SIGGERS.

[1872 G. 23.]

Will—Bequest of Short Leaseholds—Enjoyment in Specie—Power to retain Investments.

A testator gave several leasehold houses held upon short terms to trustees to pay the income to his wife for life, and then to his grandchildren, and he gave his trustees, one of whom was his wife, power to retain any portions of his property in the same state in which it should be at his decease, or to sell and convert the same as they should in their absolute discretion think fit.

Held, that the special power to retain existing investments took the case out of the general rule as to conversion of perishable property, and that the trustees were at liberty to retain the short leaseholds and any other investments held by the testator for such period as they should think fit.

JAMES SIGGERS, of *Newcastle Street, Strand*, by his will dated the 19th of March, 1871, gave, devised, and bequeathed all his real estate and all the residue of his personal estate to his wife, *Martha Siggers*, and to his partner *Charles Tomkins*, their executors, administrators, and assigns, upon trust to pay and apply the annual income arising therefrom to his wife during her life, she maintaining and educating his granddaughter and grandson thereinafter named, and after the decease of his wife upon trust to realize and divide his trust estate as follows, namely, one third part thereof unto his granddaughter *Mary Martha Gray*, and the remaining two third parts unto his grandson *James Siggers Gray*, on their respectively attaining twenty-one years, but in case either of them should happen to die under twenty-one and without leaving issue, then he gave the share of the one so dying to the survivor upon attaining twenty-one years. And the will contained the following clause: "I empower my trustees to retain

all or any portion or portions of my trust estate in the same state in which it shall be at my decease, or to sell and convert the same or any part or parts thereof into money, and either by public auction or private contract, at such time and in such manner and for such prices and under such terms and conditions, with full power to rescind any contract either gratuitously or otherwise, and to buy in and re-sell the same without being responsible for any consequent loss, and to convey, assign, and assure all premises so sold to the purchaser or purchasers thereof as my trustees shall in their absolute and uncontrolled discretion think fit, and also in such discretion to invest any moneys to arise from such sale and conversion in such manner and on such securities as my trustees shall think proper." And the testator appointed the before-mentioned trustees executors of his will.

The testator died on the 18th of May, 1871; at the time of his death he was seised or possessed of real and personal estate of very considerable value. The real estate for the most part consisted of freehold houses in *London*, and the personal estate consisted of a very large number of leasehold houses, many of which, as also many of the freehold houses, were in poor neighbourhoods, and let out to weekly tenants, and also of large sums of money invested in government and foreign stocks, and also of numerous sums to a considerable amount, which had been advanced on different securities, including a very large number of bills of exchange and promissory notes. The action was brought by the granddaughter and grandson of the testator, who were infants, by their next friend for the administration of the will, and the claim stated the question now raised for decision in these words: "Regard being had to the language of the said will, to the nature of the testator's estate, and to the fact that the Defendant *Martha Siggers* is one of the executors and trustees thereof, and is also the tenant for life thereunder, a question arises as to how far the estate of the testator ought to be kept in the same character and in the same state of investment in which it was at the time of the decease of the testator, or how far the real and personal estate of the testator ought to be converted and invested in some of the securities in which money under the control of the Court of Chancery is authorized to be invested, or in what other manner

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any money arising or to arise from the testator's estate and which may be in the hands of the defendants, ought to be invested, and how far the discretion of the defendants as to any such investment ought to be controlled."

Bristowe, Q.C., and *Simmonds*, for the granddaughter and grandson of the testator:—

We say that the leaseholds given by the will to the testator's wife, and afterwards to his granddaughter and grandson, ought at once to be sold and the interest paid to the widow for life. The testator was possessed of many small leasehold houses, the leases of which expired at various times, some of them being very short terms. It is evident if these are not sold the granddaughter and grandson will in a few years derive no benefit from them, and it is as much for the interest of the widow as of the children that these leaseholds should not be allowed to run out. In *Macdonald* v. *Irvine* (1) it was held that the property, which was of a perishable nature, must be sold according to the rule in *Howe* v. *Earl of Dartmouth* (2). The same principle was acted upon in *Caldecott* v. *Caldecott* (3) and *Vaughan* v. *Buck* (4); and in *Pickering* v. *Pickering* (5) Lord *Cottenham* held that where there was a residuary bequest of personal estate to be enjoyed by several persons in succession, a Court of Equity would assume that it was the intention of the testator that his legatees were to enjoy the same thing in succession, and the only means of giving effect to such intention was to convert into permanent investments all such parts of the estate as were of a wasting or hazardous description.

Glasse, Q.C., and *Gardiner*, for the testator's widow, were not called upon by the Court.

J. Pearson, Q.C., and *Shebbeare*, for the second trustee.

MALINS, V.C.:—

If this question had rested only upon the first part of the will, in which the testator gives his estate in trust to pay the annual

(1) 8 Ch. D. 101.
(2) 7 Ves. 137.
(3) 1 Y. & C. Ch. 312.
(4) 1 Ph. 75.
(5) 4 My. & Cr. 289.

income to his wife for life, and after her death to divide it between the grandchildren, then it is perfectly clear that all perishable property, such as leaseholds or wearing out property of any description, or foreign securities, must have been converted for the benefit of all parties interested, so that the wife would have had the life interest, and the capital would have been preserved for the granddaughter and grandson. That would have come strictly within *Howe* v. *Earl of Dartmouth* (1), and also within the case of *Macdonald* v. *Irvine* (2), where there was no discretion, no power, no restraint whatever imposed upon or given to the trustees. But the testator here, having given all his property to his wife for life in the general form without adding any words to shew that the property was to be held in the state in which it existed at his death, adds this very precise declaration: "I empower my trustees to retain all or any portion or portions of my trust estate in the same state in which it shall be at the time of my decease, or to sell and convert the same, or any part thereof, into money, in such manner and for such prices and under such terms and conditions as they shall in their absolute and uncontrolled discretion think fit." So that they have the most complete power of selling if they think fit, and of retaining if they think fit: retaining for the purpose of enabling the wife to have the same income and the same enjoyment from it that the testator himself had. Therefore the case is entirely taken out of *Howe* v. *Earl of Dartmouth* and *Macdonald* v. *Irvine*, because of this power which gives the trustees the right to retain the property in specie. I cannot look at the question whether the leaseholds are for long or short terms, because, whether long or short, the widow was to have the property in specie if the trustees thought fit to retain it. Then look at the probabilities. This testator was a small tradesman. He was of miserly habits, and made his money chiefly by discounting bills. His property consisted of Spanish and Mexican bonds and a considerable amount of leasehold property. If the leaseholds were sold his wife, instead, perhaps, of getting £100 a year, might not have more than £20 a year. I think he intended, if the trustees thought fit, that she should enjoy the property in specie just as he himself was enjoying it.

(1) 7 Ves. 137. (2) 8 Ch. D. 101.

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Glasse, Q.C.:—It may be satisfactory to your Lordship to know that your predecessor, Vice-Chancellor *Kindersley*, under a like power, decided in exactly the same way. The case is *Simpson* v. *Lester* (1).

MALINS, V.C.:—As Sir *R. Kindersley* was clear upon it, I hope I am right.

There must be a declaration that the trustees are at liberty to retain the leasehold property in specie, and any other investment held by the testator, for such period as they in their discretion may think fit.

Solicitors: *Kynaston & Gasquet; Nicol, Son, & Jones; W. R. Scudamore.*

V.-C. M. 1880 *July* 2.

In re T——.

Practice—Advice of Court—22 & 23 Vict. c. 35, s. 30—Married Woman of Unsound Mind—Income—Consent to Investment—Trustees.

A married woman who was of unsound mind, but not so found by inquisition, was entitled for her separate use to the income of certain trust funds. Her written consent was also required to the investments by the trustees.

Upon a petition under the *Trustee Relief Act* (22 & 23 Vict. c. 35, s. 30) for the advice of the Court:—

Held, that the Court had jurisdiction to entertain the petition; that the whole income might be paid to the husband on his undertaking to apply it to the maintenance of the wife, and that her consent to investments might be dispensed with.

UNDER a marriage settlement and two wills certain trust funds were vested in trustees upon trust to pay the income thereof to the married woman during her life for her separate use, with ultimate trusts for her children. The settlement and one of the wills required her consent in writing to any investment by the trustees. The total annual income of the trust funds amounted to about £119.

The married woman had become of unsound mind, but was not

(1) 4 Jur. (N.S.) 1269.

so found by inquisition. She was in a lunatic asylum, supported by her husband at an expense of more than £300 a year. His income was about £1500, out of which he had several children to maintain.

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A petition was presented by the trustees of the settlement and the trustees of the wills for the advice and direction of the Court, under 22 & 23 Vict. c. 35, s. 30.

G. I. F. Cooke, in support of the petition, and as to the jurisdiction of the Court, referred to *In re Spiller* (1) and to *Vane* v. *Vane* (2).

Malins, V.C., was of opinion that this was a case for the advice of the Court under the Act; and that the trustees ought to pay the whole of the married woman's income to the husband, he undertaking to apply it for her maintenance. His Lordship also considered that her consent to the investments might be dispensed with. The costs of the petition to be paid out of the income.

Solicitors: *Clarke, Woodcock, & Ryland*, agents for *Cooke & Sons, Bristol.*

In re ALBION LIFE ASSURANCE SOCIETY.

V.-C. M. 1880 *July* 3.

Insurance Company—Contributories—Shareholders—Policy-holders—Calls—Primary Liability.

By the constitution of an insurance company (unlimited) the shareholders were to receive 6 per cent. interest on the amounts paid up by them, and the profits were then to be divided, one-fourth to go to the shareholders and three-fourths to the policy-holders.

Held, that, though the policy-holders were contributories, they could not be called upon to contribute until the shareholders had been exhausted.

Affirmed by Ch. App. 16 Ch. D. 83.

By the articles of association of an unlimited company, called the *Albion Life Assurance Society*, the company was to consist of two classes of members, namely, the shareholders, and the assurance members or holders of policies entitled to participate in profits

(1) 2 L. T. (N.S.) 71. (2) 2 Ch. D. 124.

V.-C. M. 1880 *In re* ALBION LIFE ASSURANCE SOCIETY.

for the time being. The capital was to be £50,000 in 5000 £10 shares, on which interest at 6 per cent. was to be paid to the shareholders on the amounts paid up by them. The general funds of the company other than the subscribed capital were to be called the Assurance Fund, and every three years an account was to be taken of the assets and liabilities of the company and of the profits of the Assurance Fund, and of the amount which might safely be dealt with as net profits; and the net profits were to be appropriated, one-fourth among the shareholders, and the other three-fourths by way of bonus among the holders of such policies issued by the company on the terms of participating in profits as should be subsisting at the period fixed for each periodical account, regard being had to the dates of the policies, the ages of the assured, and the other circumstances of the several cases. Provision was made for the company ultimately to become a mutual assurance company by paying off the shareholders.

The company was under winding-up in the Court; and it was decided in *Winstone's Case* (1) that the assurance members or participating policy-holders were to be contributories. In pursuance of this decision, a list of policy-holding contributories had been settled.

Calls had been made upon the shareholders of £20 in respect of each share, being £10, the nominal amount, and £10 more; and the official liquidator proposed to make a call on the assurance members or participating policy-holders to the amount of 200 per cent. on the actuarial value of each policy. A summons was accordingly taken out, the hearing of which was adjourned into Court.

Glasse, Q.C., and *Boome*, for the official liquidator.

Higgins, Q.C., and *W. H. Green*, for the shareholders:—

The policy-holders have been decided to be contributories, and must now pay their contributions. Both shareholders and policy-holders are liable, and the policy-holders must pay either equally or in proportion to their share in the profits, as in the case of private partnerships, viz., three-fourths. The shareholders have

(1) 12 Ch. D. 239.

already paid more than their proportion, and the policy-holders must contribute and equalize: *Lindley* on Partnership (1); *Cox* v. *Hickman* (2).

Macnaghten, Q.C., and *Borthwick*, for a policy-holder:—

No doubt the policy-holders are on the list of contributories, but it does not follow that they are to contribute anything, and until the shareholders are exhausted they ought not to be called upon; at all events, they ought not to contribute in the same proportion. It is not true that the profits were to be divided in the proportion of one to three, because the shareholders were first to receive 6 per cent. It is difficult to say in what proportions they ought to contribute, but certainly not equally, as proposed. In no case has a policy-holder been made to pay as long as there were shareholders who could pay. The shareholders had the management, and might have gone on and divided large profits, and then, when losses occurred, they might, according to their contention, call upon the policy-holders to pay three-fourths. As long as the company was going the shareholders were the only persons liable, and it is monstrous to say that, by winding up, three-fourths of the burden is to be shifted on to the policy-holders.

Higgins, in reply:—

No shareholder could be called upon for more than £10 a share; and at all events when that has been paid the shareholders can only be called upon to contribute rateably with the policy-holders, who must also contribute.

MALINS, V.C.:—

The case before me is very extraordinary. So far as I know, it is entirely novel; and whether the liability to pay the debts of this company falls upon the shareholders, or partly upon the shareholders and partly upon the assured, they are objects of great commiseration. [His Lordship then stated the facts of the case.] The question whether an assurance member was a contributory was very fully and elaborately argued before Mr. Justice

(1) 4th Ed. vol. i. p. 19. (2) 8 H. L. C. 268.

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Fry, sitting for me, in *Winstone's Case* (1), and he came to the conclusion that the assurance members were liable as contributories, and liable therefore to calls, but expressly left open the question to what extent they were liable, or what was the extent of the liability of the two classes of contributories as between themselves.

There remains, therefore, the question what is the extent and order of their liability. This being an insurance company, formed of shareholders, established for personal gain, associated together to invite the public to take policies in their office, to collect premiums, and to incur the liability of paying the amount assured on the falling in of the life, it would be a most extraordinary thing if a person taking a policy should incur the liability of paying three-fourths of the debts of the company, and to that extent, therefore, letting off those who were the proprietors of the company.

This company was unlimited, the consequence of which is that every shareholder is liable to be called upon to pay as long as there are any debts of the company unsatisfied; but Mr. *Higgins* says that no calls are to be made upon them for more than £10, as I understand his argument; but there was nothing which would enable the directors of this company, if they were in straits for money, as they no doubt were, to make a call upon any other body than their shareholders. The only obligation upon the policy-holder is to pay the premium; but even that is merely a condition and not an obligation, because any policy-holder might allow his assurance to drop, and he is under no obligation to pay the premium to the company.

Then, is there any instance to be found, from the time of the establishment of such partnerships down to the present time, in which a person not liable to pay a single penny during the continuance of the partnership has been held liable to pay the debts, or nearly the whole of the debts, if the partnership happens to come to an end. I can see no principle on which it can be done. Mr. *Higgins* laid down the proposition that in the case of private partnerships, wherever there is no provision made for the liability as to debts, the right to receive profits in certain proportions carries

(1) 12 Ch. D. 239.

with it the obligation to bear the losses in the same proportion. But in that case they are liable to be called upon by each other to contribute to pay the debts while the concern goes on, which makes a complete distinction; and it being clear that the only calls which could be made during the continuance of this concern were upon the shareholders, it seems to me to follow that the only calls that can be made after the determination of the concern are also upon the shareholders. They were the persons to pay, and they are the persons for whom the company was established; and it is not an immaterial circumstance, to which my attention was drawn by Mr. *Macnaghten*, that the shareholders are to receive 6 per cent. interest on the amount paid upon their shares. This being, in my opinion, until certain events have happened, which have not happened, a share company, not a mutual society, there was a primary liability and a secondary liability, and surely those persons who were liable to pay the debts when the concern was going on are the persons primarily liable to pay the debts after the concern has stopped, and, if necessary, has been wound up. That seems to me to be the general principle of partnerships and of joint stock companies also; and I believe there is not an instance to be found of persons who could be called upon to pay while the concern is going, who must not, under such circumstances as these, be also primarily liable after it has stopped.

Now, if I am right in this general view, I confess I am unable to see any ground upon which it can be put otherwise in this particular case. [His Lordship then commented on the provisions of the deed as to division of profits as making no difference.] Therefore it appears to me, taking all I have said into consideration, and having regard to the arguments on both sides, that there is a primary liability upon the shareholders, and that when the shareholders are ascertained to be unable to pay, then, and not till then, in my opinion, can resort be had to those who are called the assurance members.

Solicitor for Liquidator: *G. Blagden.*
Solicitor for Shareholders: *V. I. Chamberlain.*
Solicitors for Policy-holders: *Miller, Smith, & Bell.*

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1880
une 22.

In re STANSFIELD.
STANSFIELD *v.* STANSFIELD.

[1878 S. 314.]

Will—Construction—Class or Personæ designatæ—Wills Act (1 *Vict. c.* 26), *s.* 33.

Testator directed that at the decease of his wife (who died in his lifetime) his real estate and household furniture should be sold, and the moneys equally divided "between my nine children." He then bequeathed his personal estate not thereinbefore bequeathed to his trustees, upon trust to get in and convert the same into money, and pay and divide the same "equally to and between all my children," except that his eldest son *John*, by reason of his becoming entitled to a piece of property by a different title, should receive £30 "less than each of my other children":—

Held, that the gift of residuary personalty was a gift to the testator's nine children as persons designated; and hence that the representative of a child who died in the testator's lifetime was entitled to participate by virtue of the 33rd section of the *Wills Act*, 1837.

SPECIAL CASE.

The testator, *Jonathan Stansfield*, then of *Roomfield Lane*, in *Todmorden*, in the county of *York*, died on the 23rd of December, 1876, having made his last will and testament dated the 19th of February, 1870, and which will, after appointing his sons *Thomas* and *John* trustees and executors thereof, provided as follows:—

"I give and devise my freehold messuages and hereditaments at *Roomfield Lane* aforesaid to my said trustees, on trust to let the same, and pay the rents and income thereof to my dear wife *Hannah* during her life for her own separate use. I also give and bequeath my household goods and furniture, plate, linen, china, books, and all other household effects, to my said trustees, on trust that my wife may use and enjoy the same during her life, and at her decease I direct that my said messuages and premises and my household furniture and other effects above mentioned shall be sold, in trust that the trustees or trustee of my will shall sell and convert the same into money. And I direct that the moneys arising from such sale shall be divided equally between my nine children; and I bequeath the same accordingly. I give and bequeath all my money and other personal estate not herein-

before bequeathed to my said trustees, in trust to get in and convert the same into money, and to pay and divide the same equally to and between all my children, except that my oldest son *John*, by reason of his becoming entitled to a freehold cottage at *Top of Knowle* in *Heptonstall*, as heir-at-law of my said wife, shall receive £30 less than each of my other children; and I give and bequeath the same accordingly."

The testator's wife died in his lifetime. He had issue nine children, of whom seven only were living at his death. One, named *Susannah*, had died without having been married. Another, named *William*, had died leaving issue.

The case was between *George Stansfield*, one of the surviving children of the testator, as Plaintiff, against the executors and trustees of the will, the other surviving children of the testator, and the children of *William Stansfield*, as Defendants; and the question to be decided was:—

"Whether the residuary bequest contained in the said will is a gift to the testator's said nine children as *personæ designatæ*, so as to make sect. 33 of the *Wills Act* (1 Vict. c. 26) applicable to the case of the said *William Stansfield*, and entitle his legal personal representatives to an original ninth share of residue, or a gift to the testator's children as a class, so as to exclude the operation of the said section."

William Barber, for the Plaintiff:—

The residuary gift is a gift to a class of persons. If the testator had made his residuary gift in the same terms as that of the sale moneys, namely, to his "nine children," that would have been a gift to designated persons: *In re Smith's Trusts* (1). But the residuary gift is "equally to and between all my children," which is a gift to a class: *Dimond* v. *Bostock* (2). The use of a different form of words was intentional. The testator's reference to his "oldest son *John*" makes no difference, just as it was held, in *Dimond* v. *Bostock*, to make no difference that two of the class were excluded.

Bush, for the Defendants in the same interest:—

If the gift to the nine children living at the date of the will be

(1) 9 Ch. D. 117. (2) Law Rep. 10 Ch. 358.

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held a gift to persons designated, all after-born children would be excluded.

Except on the supposition that the testator meant to draw a distinction between his "nine" children and "all" his children, there was no necessity for the separate gifts of the sale moneys and of the residue: *Olney* v. *Bates* (1); *Browne* v. *Hammond* (2).

The result is that the statute cannot apply as it would have applied had the gift of residue been a gift to persons designated.

C. Herbert Smith, for the representative of *William Stansfield*, was not called upon.

BACON, V.C.:—

The authority of *Dimond* v. *Bostock* (3), which has been referred to, is very useful as an illustration, but I cannot consider it as laying down any universal rule.

In the gift of the proceeds of sale of his real estate and furniture the testator speaks of his nine children, and the argument has been that when he speaks in the gift of residue of "all" his children that expression constitutes a class. I cannot follow that. When he speaks of "my nine children" that is the same thing as if he had mentioned them all by name. It renders them *personæ designatæ* beyond all doubt. Then when he comes to deal with the residue he makes a gift to all his children, clearly meaning all the children who were the objects of the other gift.

With all respect to decisions which have been arrived at in cases where the Court has had to deal with puzzling or ambiguous expressions, I find here no puzzle, no ambiguity; and accordingly I have no hesitation in deciding that this residuary bequest was a gift to the testator's nine children as *personæ designatæ*.

Answered accordingly.

Solicitors: *Torr, Janeways, Torr, & Gribble; Rickards, Maude, & Maude.*

(1) 3 Drew. 319. (2) Joh. 210.
(3) Law Rep. 10 Ch. 358.

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[1878 H. 17.]

Married Woman—Separate Estate—General Engagements—Statute of Limitations.

Moneys advanced by a stranger in providing necessaries for the support of a married woman, living separate from her husband, are debts binding her separate estate; and, being debts payable out of funds held in trust for her separate use, are not barred by the *Statute of Limitations*.

ACTION for the administration of the trusts of the will of *Mary Barber*, deceased, by a person who claimed to be a creditor upon her separate estate, and who had also, since commencing the action, obtained letters of administration with the will annexed to *Mary Barber*.

By a deed of separation between *Mary Barber* and her husband, dated the 13th of September, 1866, all her interest in her deceased father's real and personal estate was vested in the Defendant, *Joseph Williamson*, upon trust to pay the rents and profits to *Mary Barber* during her life for her separate use, and on her decease to raise and pay £200 to her husband, should he be living, and, subject thereto, to such persons as she should by deed or will appoint.

By her will, dated the 7th of February, 1870, *Mary Barber* exercised her power of appointment over the real and personal estate in favour of two of the Defendants to this action.

She died on the 16th of March, 1870, and her will had not been proved by the executors named therein.

The affairs of her deceased father's estate being in a complicated state from pending litigation, nothing was ever paid to her under the trusts of the separation deed, and being in a destitute condition, moneys for her board, lodging, and support, amounting to £188 11*s.* 11*d.*, had been advanced to her by the Plaintiff, who, upon her death, had also paid her funeral expenses—£37 17*s.* 10*d.*

In November, 1870, the suit of *Barber* v. *Williamson* was instituted for the purpose of carrying into execution the trusts of the

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separation deed, and, if necessary, of *Mary Barber's* testamentary appointment.

In July, 1877, the Chief Clerk certified that the property which was subject to the trusts of the separation deed was a sum of £3500 which had unexpectedly been recovered in another suit. Upon the hearing of *Barber* v. *Williamson* on further consideration, in November, 1877, this sum of £3500 was ordered to be carried over in moieties to the separate accounts of the appointees under the will of *Mary Barber*. It was then attempted to obtain a direction for the payment of *Mary Barber's* debts, but the Vice-Chancellor declined to give any such direction, being of opinion that the creditors "must take independent action." Accordingly, in March, 1878, the Plaintiff commenced this action on behalf of himself and all other the creditors of *Mary Barber* against the trustee of the separation deed and the appointees under *Mary Barber's* will for an account of the debts and payment out of the moneys in Court; and also claiming that if, and so far as necessary, the action might be taken as supplemental to that of *Barber* v. *Williamson*.

Since commencing the action, the Plaintiff, upon an objection taken by the Defendants, had obtained letters of administration to *Mary Barber* with her will annexed.

Two questions were raised in the action:—

1. Whether moneys advanced for the support of a married woman separated from her husband were debts binding her separate estate.

2. Whether such debts being, if payable, payable out of funds held in trust for her separate use, could be barred by the *Statute of Limitations*.

Morgan, Q.C., and *G. B. Finch*, for the Plaintiff:—

As to the claim for funeral expenses, the *Statute of Limitations* does not begin to run until letters of administration are taken out, unless it has begun to run in the lifetime of the intestate: *Burdick* v. *Garrick* (1); *Seton* on Decrees (2). As to the Plaintiff's claim against *Mary Barber's* separate estate for necessaries supplied to her during her lifetime, the claim being not against her per-

(1) Law Rep. 5 Ch. 233, 241. (2) 4th Ed. p. 834.

sonally, but against her separate property as a trust fund, is not barred by the *Statute of Limitations*: *Lewin* on Trusts (1); *Norton* v. *Turvill* (2); a decision which has never been reversed or qualified, and against which no exception has been taken by any subsequent Judge until, in *Vaughan* v. *Walker* (3), where Lord Justice *Blackburne*, dissenting from Lord Chancellor *Brady*, was of opinion that a married woman being "in respect of her separate property as competent to contract as if she were a *feme sole*," ought not to be excluded from the defence of the *Statute of Limitations*, "of which, if the demand had been one for which if sole she could have been sued at law, she would have had the advantage" (4). This case is stronger than *Norton* v. *Turvill*, as the decree in *Barber* v. *Williamson* operates to keep alive the Plaintiff's right. An intention on the part of a married woman to charge her separate estate may be inferred from the nature of the dealings between the parties without any express promise or contract to that effect: *Johnson* v. *Gallagher* (5); *Hartford* v. *Power* (6); and if she contracts debts when living apart from her husband, the Court is bound to impute to her the intention to deal with her separate estate unless the contrary is clearly proved: *McHenry* v. *Davies* (7). Assuming that the Plaintiff's charge upon the separate property of Mrs. *Barber*, over which she had a power of appointment, has been established, and is not affected by the *Statute of Limitations*, such property is subject to the payment of the Plaintiff's charge, in preference to the interest in it of her appointees: *London Chartered Bank of Australia* v. *Lemprière* (8); *In re Harvey's Estate* (9).

[Upon the right of the Plaintiff, as administrator of *Mary Barber*, to administer the estate as against her appointees, they cited *In re Philbrick's Trusts* (10); *Coombs* v. *Coombs* (11).]

Sir *H. Jackson*, Q.C., and *W. Barber*, for the Defendants:—

In *Barber* v. *Williamson*, Vice-Chancellor *Hall* refused, upon

(1) 7th Ed. p. 653.
(2) 2 P. Wms. 144.
(3) 8 Ir. Ch. Rep. 458.
(4) Pages 465, 467.
(5) 3 D. F. & J. 494, 514.
(6) I. R. 2 Eq. 204.
(7) Law Rep. 10 Eq. 88.
(8) Ibid. 4 P. C. 572.
(9) 13 Ch. D. 216.
(10) 13 W. R. 570.
(11) Law Rep. 1 P. & M. 288.

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the Plaintiff's application, at the hearing on further consideration in November, 1877, to direct an inquiry as to *Mary Barber's* debts, and the Plaintiff, who has not appealed from that order or taken any proceeding analogous to a bill of review, is not entitled in an independent action to obtain any judgment which will have the effect of discharging or varying the order of Vice-Chancellor *Hall*. Upon the question as to the *Statute of Limitations*, we rely upon the judgment of Lord Justice *Blackburne* in *Vaughan* v. *Walker* (1). Is there any principle for extending beyond reasonable limits the doctrine of trust, and making the liability of a married woman in respect of her separate estate more burdensome than would be the case if the debt had been that of the husband? *Primâ facie*, a married woman has no power to contract. Can it, then, be said that her separate estate is a trust fund for her creditors so as to bar the operation of the *Statute of Limitations* and let in claims by creditors however stale? The power of binding her separate estate *sub modo* by her contracts having been created by the aid and instrumentality of Courts of Equity, her debts are subject to the same liabilities and restrictions as ordinary debts at Common Law: *Vaughan* v. *Walker; Darby & Bosanquet's* Statutes of Limitations (2). At all events, for the purpose of affecting her separate estate, the Court must be satisfied that an obligation to that effect has been created either expressly, or by holding herself out as a *feme sole* (as in *McHenry* v. *Davies* (3)), or at least as a woman whose separate property would repay advances made to her. A mere general engagement will not be sufficient: *London Chartered Bank of Australia* v. *Lemprière* (4), citing Lord Justice *Turner* in *Johnson* v. *Gallagher* (5). We submit that there was no debt binding *Mary Barber's* separate estate, and if there was, the Plaintiff has come too late, and it is now barred by the *Statute of Limitations.*

BACON, V.C.:—

In my opinion the existence of these debts has been clearly established by the evidence. It is the right and in the power of

(1) 8 Ir. Ch. Rep. 458.
(2) Page 177.
(3) Law Rep. 10 Eq. 88.
(4) Ibid. 4 P. C. 591.
(5) 3 D. F. & J. 514.

a married woman to charge her separate estate. No doubt a married woman cannot contract so as to be sued at law, but she can so contract, either by express words or by just inference, so as to bind her separate estate in equity. In the present case it is established to my satisfaction that *Mary Barber* did charge her separate estate, and that she intended to do so. At the time these debts were incurred she had no means whatever except what she was entitled to under the separation deed, and as that income was not paid to her, she was penniless. The Plaintiff, under these circumstances, was induced to lend her money and to provide her with food and clothes, without which support she must have gone to the workhouse, and a debt was thereby clearly contracted; not, indeed, a debt which could be sued for at law, but nevertheless a valid debt and one intended to be paid; one for the repayment of which she must have intended to bind, and did bind, her separate estate. In my opinion none of the authorities which have been referred to have any application to the case, with the exception of *Norton* v. *Turvill* (1) and *Vaughan* v. *Walker* (2). *Norton* v. *Turvill* has always been acted upon as good law, and indeed has never been questioned since its decision in 1723 except by the Irish Lord Justice of Appeal (*Blackburne*) in *Vaughan* v. *Walker*, and his judgment proceeds on a fallacy (I say so with all respect), for he says that when by the creation of a separate estate trusts were sanctioned for securing to married women the independent and exclusive enjoyment of property, it was a just and necessary consequence that care should be taken that this was not converted into the means of imposition, and that the Court should enforce the payment of debts for which it had so enabled them to obtain credit. "Accordingly the authorities all, in terms and in substance, pronounce a married woman to be in respect of her separate property as competent to contract as if she were a *feme sole*." Now, the only manner in which a married woman can contract is by charging her separate estate, and the remedy of the creditor is not at law but in equity against the trustee of her separate estate; and, unless I depart from plain and well-established principles, I must hold that a charge was created on her separate estate for the repayment of the money expended in providing her with neces-

(1) 2 P. Wms. 144. (2) 8 Ir. Ch. Rep. 458.

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saries—absolute necessaries—and that the *Statute of Limitations* does not apply and cannot now be pleaded. Then, as to the objection that this is a stale demand, and that there has been laches on the part of the present Plaintiff, just consider what the nature of *Mary Barber's* interest was. For years this interest of hers was the subject of litigation, and it was not until 1876 or 1877 that it was ascertained to what she was entitled. Before this time the suit of *Barber* v. *Williamson* was instituted to administer the trusts of the separation deed; the Chief Clerk makes his certificate and the suit comes on for further consideration, and some suggestion is made that the order made by Vice-Chancellor *Hall* is a bar to the present Plaintiff's claim. I do not think that the order of Vice-Chancellor *Hall* in the least interferes with the right of the Plaintiff to bring the present action, which I consider a proper supplemental action—supplemental in the very sense of the word. The right of *Mary Barber* to a share in her father's estate was a trust from the beginning, and this trust fund became burdened from the beginning with the repayment to the Plaintiff of the moneys expended by him for *Mary Barber;* the mere fact that this fund is in the possession of the Court cannot prejudicially affect the right of the Plaintiff to repayment. As to the funeral expenses, there can be no doubt that the Plaintiff is entitled to them. The Plaintiff does not come too late when he says there is now for the first time a fund out of which he can be paid, and he comes and asks for payment.

Solicitors: *Le Riche & Son*, agents for *Robinson & Robinson, Settle; Ridsdale, Craddock, & Ridsdale*, agents for *Chadwick & Sons, Dewsbury.*

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Jan. 31; *March* 12, 13, 16.

[1879 G. 148.]

Mortgagor and Mortgagee—Foreclosure Action—Debt payable by Instalments—Personal Judgment against Mortgagor—Redemption by Third Person—Securities to be transferred by Mortgagee—Sale—Leave to apply in Chambers—15 & 16 Vict. c. 86, s. 48.

In a foreclosure action personal judgment for the mortgage debt being given against the mortgagor, and a foreclosure judgment against the mortgagor and a purchaser from him:—

Held, that the purchaser, in the event of his redeeming the mortgage, would be entitled to have transferred to him the personal judgment against the mortgagor, as being one of the securities held by the mortgagee for the debt.

Leave was given to the purchaser to apply in Chambers for a sale of the property.

Form of foreclosure judgment when mortgage debt is payable by instalments.

THIS was a foreclosure action.

The Plaintiffs were the executors of an equitable mortgagee by deposit of title deeds; the Defendants were *Littler*, the mortgagor, and *Hughes*, a person to whom he had contracted to sell the mortgaged property. The mortgage debt was originally payable in one sum in the ordinary way, but afterwards an agreement was come to that it should be paid by instalments, and a promissory note was given by the mortgagor to the mortgagee, which provided that the debt should be paid by instalments at specified dates. Default had been made in payment of some of the instalments.

The Plaintiffs claimed to have an account taken of the amount due from the Defendant *Littler* to the estate of their testator for principal and interest; that *Littler* might be ordered to pay to them the amount found due from him; and that, in default of *Littler* and *Hughes*, or one of them, paying that amount to the Plaintiffs, together with the costs of the action, the Defendants might be respectively foreclosed of all right or equity of redemption in the mortgaged property.

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Cookson, Q.C., and *O. L. Clare*, for the Plaintiffs.

R. W. Ingham, for the mortgagor, assented to an immediate judgment for the whole original mortgage debt.

North, Q.C., and *W. Barber*, for the purchaser, asked that, in the event of his redeeming the mortgage, the personal judgment against the mortgagor might be transferred to him by the Plaintiffs, as being one of the securities which they held for their debt.

Cookson, Q.C., did not object, but said that this would be a novelty in practice.

FRY, J.:—

The practice of giving personal judgment against the mortgagor for the mortgage debt in a foreclosure action is new. If, under the old practice, the mortgagee had obtained judgment in a common law action for the mortgage debt, that judgment would have been a security for the debt which he would have had to transfer to the person who redeemed him. I see no reason why the same thing should not be done now.

North, Q.C., then asked that the purchaser might have liberty to apply in Chambers for a sale of the property: *Burmester* v. *Moxon* (1). If the judgment was drawn up as a foreclosure judgment *simpliciter*, he would not be able to do this. If he should redeem the Plaintiffs, he might wish for a sale as against the mortgagor. The liberty asked for could not prejudice the Plaintiffs, because they would have an opportunity of resisting the application in Chambers when it was made.

Cookson, Q.C.:—In *Burmester* v. *Moxon* the application was by a second mortgagee.

FRY, J.:—

The words of sect. 48 of 15 & 16 Vict. c. 86, are very wide. I

(1) 35 Beav. 310.

will give liberty to apply in Chambers for a sale on such terms as the Judge shall direct.

March 12. The action was at the instance of the mortgagor again put into the paper for trial on the ground that the agreement was that the mortgage debt should be payable by instalments, and that he had not authorized his solicitor to consent to an immediate judgment for the whole debt.

Cookson, Q.C., and *O. L. Clare*, for the Plaintiffs, contended that, by reason of the default in payment of some of the instalments, the whole debt became immediately due.

H. J. Lake, for the mortgagor, contended that the agreement was that the debt should only be payable in the instalments.

North, Q.C., and *W. Barber*, for the purchaser.

March 16. FRY, J., held, upon the construction of the agreement, that the debt was only payable in instalments.

MINUTES:—Declare that the moneys due from the Defendant *Littler* to the Plaintiffs are payable by the instalments and in manner provided by the promissory note in the pleadings mentioned.

Order that an account be taken of what is due to the Plaintiffs for principal moneys and interest upon the said promissory note down to the date of the Chief Clerk's certificate to be made pursuant to this order, and for their costs of this action.

Order that the Defendant *Littler* do within fourteen days after the date of the certificate pay to the Plaintiffs the amount which shall be certified to be due and payable to them for such principal, interest, and costs as aforesaid.

Liberty to the Plaintiffs to apply to the Judge in Chambers as to the payment of any principal moneys and interest hereafter to become payable upon the said promissory note as they may be advised.

Declare that the Plaintiffs are entitled to a charge upon the mortgaged property as well for the principal moneys, interest, and costs hereinbefore ordered to be paid to them by the Defendant *Littler*, as for all principal moneys and interest hereafter to become payable to them in respect of the said promissory note.

Liberty to Plaintiffs to apply in Chambers as to giving effect to the said charge by sale, foreclosure, or otherwise, as they may be advised.

Order that, in the event of the Defendant *Hughes* paying to the Plaintiffs the whole of the principal moneys and interest and costs secured to them by the aforesaid charge, the Plaintiffs are to transfer to the Defendant *Hughes* the benefit

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of the said charge and the benefit of this judgment, and the Defendant *Hughes* is to be at liberty to enforce this judgment in the names of the Plaintiffs upon indemnifying them sufficiently against any costs and expenses they incurred. Amount of indemnity to be settled in Chambers in case the parties differ.

Liberty for Defendant *Hughes* to apply in Chambers for a sale of mortgaged property.

General liberty to apply.

Solicitors for Plaintiffs: *Pritchard, Englefield, & Co.*, agents for *Grundy, Kershaw, & Co., Manchester.*

Solicitor for Mortgagor: *P. Collings.*

Solicitors for Purchaser: *Andrew & Wood*, agents for *Grover & Son, Hemel Hempstead.*

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WILLMOTT *v.* BARBER.

[1879 W. 48.]

Specific Performance—Discretion of Court—Inconsistent prior Agreement—Lease—Covenant not to assign without written License of Lessor—Mistake of Title—Outlay of Money on another Person's Land—Acquiescence.

The Court will not compel a Defendant specifically to perform an agreement when the result would be to compel him to commit a breach of a prior agreement with another person.

The lessee of three acres of land agreed in January, 1874, to let one acre to the Plaintiff for the whole of the residue of his term, and he agreed also to sell to the Plaintiff his interest in the whole three acres at any time within five years from the date of the agreement. The lease contained a covenant by the lessee not to assign the property, or to part with the possession of it or any part of it, without the written consent of the lessor. The Plaintiff was not, in fact, aware of this covenant. He was let into possession of the one acre, and he laid out money upon it, and also upon adjoining property of his own with the view of occupying the two together. The lessor was aware of this expenditure. In October, 1877, the lessee, without the Plaintiff's knowledge, surrendered the lease to the lessor, in exchange for a new lease for a longer term of the three acres together with other property. The new lease contained a similar covenant by the lessee not to assign, &c., without license. In November, 1877, the Plaintiff gave the lessee notice of his desire to exercise his option to purchase his interest under the original lease in the three acres. The lessee declined to perform his agreement, on the ground that the lessor refused to give his license to an assignment. The Plaintiff brought the action against the lessee and the lessor, claiming specific performance of the agreement by the lessee, and to compel the lessor to give his license, on the ground, *inter alia*, that he had acquiesced in the

Plaintiff's expenditure knowing that he was acting in the mistaken belief that the lessee was able to assign the property to him. It appeared that the lessor was not, when the Plaintiff's expenditure was incurred, aware of the existence of the lessee's covenant not to assign without license:—

Held, that the lessee could not be compelled to perform his agreement, inasmuch as his doing so would involve a breach of his prior covenant not to assign without license, for that, as the Plaintiff was seeking to treat the original lease as still subsisting for one purpose, he must treat the covenant not to assign contained in it as still subsisting:

Held, also, that inasmuch as the lessor was ignorant of his own rights, and there was nothing to shew that he knew that the Plaintiff had been acting in ignorance of his legal rights, the lessor could not be compelled to give his license to assign to the Plaintiff.

The circumstances under which the owner of a legal right will be precluded by his acquiescence from asserting it considered.

Mistake of fact is not the less a ground for relief because the person who has made the mistake had the means of knowledge.

THIS action was brought for the specific performance of an agreement for the sale of some leasehold property.

In the year 1874 the Plaintiff, *Joseph Willmott*, was the proprietor of a saw-mill and premises at *Bow Bridge, Stratford, Essex*, adjoining the River *Lea*, and next to a piece of marsh land, which was occupied by the Defendant *John Barber* under a lease granted to him by the Defendant *William Bowyer* on the 17th of September, 1869, at a yearly rent of £100, for the term of ninety-nine years from the 25th of March, 1869. The land comprised in the lease contained nearly three acres. The lease contained a covenant by the lessee that he, his executors, administrators, or assigns, would not, without the previous written license of the lessor, his heirs or assigns, assign, underlet, or part with the possession of the demised premises or any part thereof, and a proviso for re-entry exerciseable by the lessor, his heirs or assigns (*inter alia*), if and whenever the lessee, his executors, administrators, or assigns, should assign or underlet or part with the possession of the demised premises or any part thereof without such license as aforesaid.

On the 5th of January, 1874, the Defendant *Barber* and the Plaintiff entered into the following agreement:—

"*John Barber* hereby agrees to let to *Joseph Willmott* one acre of his field adjoining the River *Lea* and the saw-mill premises, *Bow Bridge, Stratford*, being 350 feet deep from the river, and

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sufficiently wide to make up the acre of land, for the whole of his term, being ninety-four years from Christmas last or thereabouts, for the yearly rental of £100. And *John Barber* hereby further agrees to sell his right, title, and interest in the whole of the said field and premises now occupied by him for the sum of £1500, at any time within five years from this date. And the said *Joseph Willmott* agrees to rent the said one acre of land at £100 per annum from Christmas last on the condition that he has the option of purchase of the whole of *John Barber's* right, title, and interest in the whole of the said field within five years from the present date for £1500, and *Joseph Willmott* now pays the said *John Barber* £25 as deposit money, to bind the bargain, the same being considered to be the first quarter's rent in advance. And *Joseph Willmott* further agrees to pay *John Barber* any further sum that he may lay out in buildings to the extent of £500, and any further sum that the said *Joseph Willmott* and *John Barber* may agree upon in writing together. The ground referred to to be fenced in within twelve months.

"The right, title, and interest referred to is the lease of a field containing nearly three acres of land, with all buildings thereon and improvements appertaining thereto, rented by *John Barber* of *William Bowyer* for an unexpired term of ninety-four years or thereabouts from Christmas last, at a rent of £100 per annum, with no further conditions to be fulfilled by the tenant *John Barber*, and the buildings for the extra £500 referred to are to be substantial brick buildings, each of the value of £100 at least."

The Plaintiff was let into possession of the one acre of land soon after the date of the agreement, and he fenced it in within twelve months. He laid out a considerable sum of money in carting materials to the land, and raising its level, and converting it into a timber yard, and he also laid out a large sum of money in enlarging and improving his saw-mill and premises. On the 16th of October, 1877, *Barber*, without the Plaintiff's knowledge, surrendered the lease of the 17th of September, 1869, to *Bowyer*, and *Bowyer* granted him a new lease of the same premises, together with some additional land, at an increased rent, for the term of ninety-nine years, from the 25th of March, 1877. This

lease contained a covenant by the lessee not to assign, underlet, or part with the possession of the demised premises or any part thereof without the previous written license of the lessor, his heirs or assigns. And there was a proviso for re-entry by the lessor, his heirs or assigns, upon (*inter alia*) the breach of this covenant. On the 6th of November, 1877, the Plaintiff gave notice in writing to *Barber* of his intention to exercise the option of purchase given to him by the agreement of the 5th of January, 1874, and required him forthwith to assign to him all his right, estate, and interest in the premises comprised in the lease of the 17th of September, 1869, on payment of £1500. *Barber* alleged that he could not make the assignment without the license of *Bowyer*, and that *Bowyer* refused to grant the license. Ultimately the action was brought by the Plaintiff against *Barber* and *Bowyer*.

By his statement of claim the Plaintiff alleged that he had with the consent of *Bowyer* entered into and since continued in the occupation of the one acre and had paid the rent; that previously to the execution of the agreement of the 5th of January, 1874, *Bowyer* saw and approved of it, and that he also frequently afterwards approved of and consented to the agreement, and to the Plaintiff being the tenant of the one acre with the option of purchasing the whole field, and to the Plaintiff's expending much labour and money upon and in improving the one acre and also the Plaintiff's adjoining saw-mill and premises; and that *Bowyer* had so acted and authorized *Barber* to deal with the Plaintiff, as well as led the Plaintiff to act, that he could not now refuse his assent or license to the assignment of the whole field to the Plaintiff, and that his non-concurrence and assent would, if allowed, be a gross fraud upon the Plaintiff.

The Plaintiff claimed specific performance by *Barber* of the agreement, and an assignment of the premises to the Plaintiff on payment of the purchase-money; a declaration that *Bowyer* had no right to refuse his assent or license to the assignment, and an order upon him to give such assent or license, or to concur in such assignment; an injunction and damages.

Barber delivered a statement of defence and counter-claim, by which he denied the Plaintiff's right to the relief which he

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claimed, and claimed damages from the Plaintiff in respect of certain acts of waste and trespass which he alleged that the Plaintiff had committed on the land comprised in the agreement.

Bowyer delivered a statement of defence, by which he denied that he had ever assented to or approved of the agreement of the 5th of January, 1874, or to the Plaintiff's tenancy of the one acre, or to the Plaintiff's laying out money upon the property comprised in the agreement or on his own adjoining property.

The Plaintiff was examined at the trial, and said that in January, 1875, he sought an interview with *Bowyer* in consequence of *Barber's* telling him that his freeholder objected to have him as a tenant. An interview took place on the 14th of January, 1875, when, in answer to a question put by the Plaintiff, *Bowyer* said to him, "How could I object to you as a tenant? I could not wish for a better." He also said that *Bowyer* stated that he had read part of the agreement of the 5th of January, 1874.

Bowyer was examined, and said that he believed that he saw the agreement about the end of 1874 or early in 1875. He also said that he did not know until about the time when the new lease was granted to *Barber* that the lease of 1869 contained the covenant not to assign without license.

The latter statement was not contradicted.

Cookson, Q.C., and *T. A. Roberts*, for the Plaintiff:—

The case is clearly established as against the Defendant *Barber*.

And the Defendant *Bowyer* has by his conduct waived his right to insist on a forfeiture on the ground that his license to underlet was not obtained: *Doe* v. *Watt* (1); *Richardson* v. *Evans* (2).

[FRY, J., referred to *Roe* v. *Harrison* (3).]

North, Q.C., and *Freeling*, for the Defendants:—

In order to succeed against *Bowyer* the Plaintiff must prove that he has acted fraudulently, or that there has been such acquiescence on his part as would make it fraudulent for him now to assert his legal rights: *Gerrard* v. *O'Reilly* (4); *Macher* v. *Found-*

(1) 8 B. & C. 308.
(2) 3 Madd. 218.
(3) 2 T. R. 425.
(4) 3 D. & War. 414, 433.

ling Hospital (1). The nature of the acquiescence in the acts of another person in relation to land which will prevent the owner of the land from insisting on his legal rights is shewn by *Ramsden* v. *Dyson* (2). There is nothing in the present case to shew that the Plaintiff incurred any expenditure after he had made up his mind to exercise his option to purchase. But he ought to have inquired what were the provisions of *Barber's* lease. He knew that *Barber* was a tenant under a lease, and he had, therefore, constructive notice of the provisions of the lease: *Lewis* v. *Bond* (3); *Grosvenor* v. *Green* (4).

[FRY, J.:—In *Hyde* v. *Warden* (5) it was held that a person who contracts for an underlease has constructive notice of the provisions of the original lease only when he has had a fair opportunity of ascertaining for himself what they are.]

The Plaintiff had ample opportunity in the present case. But that case can only apply as between the vendor and purchaser of a lease; it cannot affect the rights of the original lessor.

[FRY, J.:—The equitable doctrine of acquiescence is founded on there having been a mistake of fact; can it be repelled by shewing that there was constructive notice of the real facts? In every case in which a man acts under the mistaken belief that he is entitled to land, he might, if he had inquired, have found out that he had no title. And yet the Courts appear always to have inquired simply whether a mistake has been made, not whether the plaintiff ought to have made it.]

There is no reason why the doctrine of constructive notice should not apply to the case of acquiescence. If a man wilfully shuts his eyes and will not look at a document, he must be treated in Equity as a man who knows its contents. If the Plaintiff wilfully shut his eyes, why should the Defendant, who was ignorant of his mistake, suffer by it? *Cosser* v. *Collinge* (6) is authority that a person who contracts for an underlease is bound to inform himself of the covenants contained in the original lease. In the present case the Plaintiff had a fair opportunity of ascer-

(1) 1 V. & B. 188.
(2) Law Rep. 1 H. L. 129, 140.
(3) 18 Beav. 85.
(4) 28 L. J. (Ch.) 173.
(5) 3 Ex. D. 72.
(6) 3 My. & K. 283.

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taining the provisions of *Barber's* lease. Suppose that immediately after the agreement had been signed the lease had been shewn, and then it had been discovered that it could not be assigned without the leave of the lessor, would the Court have enforced specific performance of the agreement?

[FRY, J., referred to *Helling* v. *Lumley* (1).]

In that case the defendant had deprived himself of his absolute power to grant a lease after he had entered into an agreement to grant it. The Court will not compel a man to commit a breach of covenant any more than it will compel him to commit a breach of trust; it will not enforce the performance of a contract if the performance of it might result in a forfeiture; *Peacock* v. *Penson* (2). In *Helling* v. *Lumley* it was the defendant's own act subsequent to his agreement which would have led to a forfeiture.

[FRY, J., referred to *Parker* v. *Taswell* (3). It was *Barber's* own act to enter into a contract to break his prior covenant. What difference can it make in principle whether the covenant or the contract came first?]

In the one case the contract is a good contract at the time when it is entered into; in the other case it is not.

[FRY, J.:—You say that the contract which is first in time is the one which is to be regarded as binding?]

Yes; the Court will not enforce the performance of the second contract when the doing so will involve the breach of the first. *Bowyer* has done nothing which will justify the Court in compelling him to give his consent to the assignment to the Plaintiff, and the Court will not compel *Barber* to break his prior contract with *Bowyer*. It has not been shewn, as it ought to have been, that *Bowyer* knew that the Plaintiff was under a mistake as to his rights when he expended the money. Again, how can *Bowyer* be compelled to execute an assignment to the Plaintiff? He has never threatened to forfeit the lease. The case against him is founded only on acquiesence, and that would bind him only not to assert his legal rights. He would not be bound by the terms of the agreement between the Plaintiff and *Barber*.

(1) 3 De G. & J. 493. (2) 11 Beav. 355.
(3) 2 De G. & J. 559.

[FRY, J.:—There might be acquiescence either in the possession by the Plaintiff or in the agreement.]

The surrender of the old lease and the grant of a new one can make no difference.

Dann v. *Spurrier* (1) and *Lehmann* v. *McArthur* (2) were also referred to.

Cookson, in reply.

The principle of *Helling* v. *Lumley* (3) applies. The granting of the new lease in 1877 operated as a surrender of the old lease; consequently the covenant, the breach of which would expose *Barber* to a forfeiture, was entered into by him after his contract with the Plaintiffs. Then, out of the larger interest acquired by him under the new lease, *Barber* is bound to make good his contract with the Plaintiff. It is as if he had had no title to the land in 1874; he acquires a title in 1877, and the interest so acquired feeds the estoppel.

[FRY, J.:—You must stand either on the new lease or on the old one. You are trying to slip in between the two.]

Barber cannot set up the old lease which his own act has put an end to. The lease is gone as against me, but in Equity it is still subsisting so far as I want it for my benefit. The covenant not to assign without license is gone, and any forfeiture would now result from the covenant which *Barber* voluntarily entered into after his contract with me: *Piggott* v. *Stratton* (4).

As to *Bowyer*, the evidence proves that he was party and privy to the agreement with the Plaintiff.

[FRY, J.:—If he saw and approved of the agreement with the Plaintiff, you would still have to shew that he knew that the Plaintiff was mistaken as to his right, that he supposed *Barber* could give him a good title without any license.]

The evidence shews that he waived the written license; there can be a parol waiver of a written license. There was also fraud, inasmuch as *Bowyer* stood by and saw the Plaintiff laying out

(1) 3 Bos. & P. 399.
(2) Law Rep. 3 Ch. 496.
(3) 3 De G. & J. 493.
(4) Joh. 341; 1 D. F. & J. 33.

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money both on the land comprised in the agreement and on his own adjoining land. Expenditure on his own land would be sufficient to give him an equity, if the money was expended on the faith of the agreement; *Jackson* v. *Cator* (1), where Lord *Loughborough* refers to the case of Mr. *Clavering*, "in which some person was carrying on the project of a colliery and had sunk a shaft at a considerable expense. Mr. *Clavering* saw the thing going on, and in the execution of that plan it was very clear the colliery was not worth a farthing without a road over his ground, and when the work was begun he said he would not give the road. The end of it was that he was made sensible, I do not know whether by a decree or not, that he was to give the road at a fair value."

[FRY, J.:—I do not think the Court would follow that case now, if it is correctly stated.]

It was recognised as an authority by Vice-Chancellor *James* in *Bankart* v. *Tennant* (2). It is immaterial whether the Plaintiff had the means of knowledge as to the provisions of *Barber's* lease. *Ramsden* v. *Dyson* (3) is distinguishable.

FRY, J., after stating the facts, continued:—

I think it is very questionable whether, after what *Bowyer* has done, he could interfere with the Plaintiff's possession of the one acre. But that point is not raised in this action, and my decision will in no way affect it.

The Plaintiff sues upon the agreement of the 5th of January, 1874, and his notice given on the 5th of November, 1877, of his intention to exercise his option to purchase the Defendant *Barber's* interest in the three acres under the lease of 1869. *Barber* raises several defences to the Plaintiff's claim. He says that he cannot perform his agreement because he has covenanted with the Defendant *Bowyer* that he will not assign the property demised to him without his written license, which he refuses to give. To this the Plaintiff replies that *Bowyer* has precluded himself by his

(1) 5 Ves. 690.
(2) Law Rep. 10 Eq. 141, 147.
(3) Law Rep. 1 H. L. 129.

conduct from insisting on his legal right to refuse his license. It is said that he was privy to *Barber's* agreement with the Plaintiff, and privy in such a sense that he is in equity bound to give effect to it. It appears to me that that contention is not made out. Assuming that *Bowyer* saw the agreement, his knowledge is not to be carried further than the actual contents of it, and it did not purport to give the Plaintiff any rights as against *Bowyer*. I am unable, therefore, to see that *Bowyer* is on this ground precluded from exercising his legal rights. In the next place it is said that *Bowyer* is bound by reason of his acquiescence in the Plaintiff's expenditure on the one acre to give effect to the agreement. It must, however, be borne in mind that a person who stipulates for a written license to assign a lease wisely stipulates for evidence in writing of his consent to an assignment, in order that the contest which often arises when there is only parol evidence may be avoided; the writing is to be an end of all strife between the parties. It requires very strong evidence to induce the Court to deprive a man of his legal right when he has expressly stipulated that he shall be bound only by a written document. It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly,

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the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do.

How, then, does the present case stand? It appears to me that the Plaintiff has proved that he was mistaken as to his legal rights. It is said that he was affected with notice of the contents of *Barber's* lease, because he knew that he held the property under a lease. It is not necessary for me to decide the point, though it may well be that as between him and *Barber* the Plaintiff is affected with notice of the contents of the lease. But, in my judgment, when the Plaintiff is seeking relief, not on a contract, but on the footing of a mistake of fact, the mistake is not the less a ground for relief because he had the means of knowledge. Then it is said the Plaintiff expended money on the faith of his mistake. But can I say that he expended the money on the faith of his right to an option to purchase the three acres, rather than on the faith of his possession of the one acre? At the time when he made the expenditure he had not exercised that option, or even made up his mind whether he would do so. I should have great difficulty in coming to a judicial conclusion that he expended the money on the faith of his having that option, free from the rights of *Bowyer*. Then, had *Bowyer* knowledge of his own rights? There is no other evidence on this point, except that he positively swears that he did not know that his consent to an assignment by *Barber* was necessary, and I have no reason to doubt the truth of what he says. Again, did the Defendant *Bowyer* know of the Plaintiff's mistake about his rights? For this purpose I must assume that the agreement between the Plaintiff and *Barber* was communicated to *Bowyer*. But if it was, what was there in it to shew him that the Plaintiff was ignorant of his rights? He might well have supposed that the Plaintiff was a prudent man, and that he had made inquiries as to the provisions of *Barber's* lease. And again, taking the Plaintiff's own account of the interview between him and *Bowyer* in January,

1875, what is there in what then passed which could lead *Bowyer* to suppose that the Plaintiff believed that he had a right to an assignment of the lease without *Bowyer's* consent in writing? The fact that he asked *Bowyer* whether he would object to him as a tenant would naturally impress *Bowyer's* mind with the notion that he believed that he had some veto in the matter. I cannot, therefore, conclude that the mistaken belief of the Plaintiff was brought home to *Bowyer's* mind, and that being so, I cannot restrain *Bowyer* from exercising his legal rights.

But the Plaintiff alleges that he is entitled to judgment for specific performance of the agreement by *Barber* on the ground that that agreement is prior in date to the restrictive covenant in the lease to *Barber* of the 16th of October, 1877. In my judgment that contention cannot prevail. I think that the Plaintiff is well founded in saying that the surrender by the Defendant of the original lease of 1869 cannot affect his rights under the agreement. But, if the Plaintiff treats that lease as still subsisting for the purpose of obtaining relief under his agreement with *Barber*, he must, I think, treat it as still subsisting for all purposes, even when it raises a difficulty in his way. And the result of so treating it would be this, that the Plaintiff would be asking me to compel the Defendant *Barber* to commit a breach of his prior covenant not to assign without license contained in the lease of 1869. That is a course which I decline to adopt. Mr. *Cookson* ingeniously asked me to treat that covenant as gone as against the Plaintiff, though the lease is to be treated as still subsisting. I think this argument is more ingenious than substantial, and I am of opinion that, if the Plaintiff treats the lease of 1869 as still subsisting for one purpose, he must do so for all purposes. I am of opinion, therefore, that the claim for specific performance fails, and, as no case for substantial damages has been opened to me, I must dismiss the action altogether. But, having regard to the fact that a number of frivolous defences have been raised, I shall dismiss the action without costs. I dismiss the counter-claim with costs, and direct that those costs shall be not less than half the costs of the litigation. I do not in any way interfere with the Plaintiff's right to the possession of the one acre, and the judgment will be expressed to be without prejudice to any right which the Plaintiff

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may have against either of the Defendants to retain possession of the one acre, and without prejudice to any right of the Defendant *Bowyer* in respect of the one acre.

Solicitor for Plaintiff: *G. Badham.*
Solicitors for Defendants: *G. J. & P. Vanderpump.*

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WELLS *v.* CHELMSFORD LOCAL BOARD OF HEALTH.

[1879 W. 169.]

Compulsory Powers—Owner—Failure to make Title—Payment into Court—Lands Clauses Act (8 *Vict. c.* 18), *ss.* 76. 77.

The Plaintiffs contracted to sell land to the Defendants, but failed to make any title to a small portion thereof. Thereupon the Defendants paid the purchase-money of the whole land (after making certain deductions therefrom in accordance with the contract) into Court under sect. 76 of the *Lands Clauses Act*, and executed a deed poll under sect. 77 purporting to vest the whole of the land in themselves:—

Held, that the Plaintiffs were not "owners" of the strip of land within the meaning of sects. 76 and 77, and that under the circumstances the Defendants could not acquire the land under those sections.

THE Plaintiffs, Messrs. *Wells & Perry*, brewers, sued for the specific performance of a contract entered into between them and the Defendants on the 31st of October, 1877, for the purchase by the Defendants from the Plaintiffs of certain land required by the Defendants for the purposes of their Act, the price of which had been duly settled by arbitration under the Act.

A certain strip of land which represented the position of an old ditch, which constituted part of the land which the Plaintiffs contracted to sell to the Defendants, turned out not to be the land of the Plaintiffs at all. That fact came to the knowledge of the Defendants early in June, 1878, and from that date there was no dispute between the parties as to the ownership of the land; and it was admitted by the Plaintiffs before they brought their action, that they could make no title to the land, and they offered to

compensate the Defendants for their incapacity to convey that portion of the land.

The Defendants' first ground of defence was that the strip of land was an essential part of that which they had agreed to buy, and, as the Plaintiffs could not convey that, they could not compel the Defendants to buy the rest from them.

Mr. Justice *Fry* held, on this part of the case, that it was not essential for the Defendants to obtain this strip of land (which was only a small part of the land sold) under this contract, because they had statutory powers under which they could obtain it from any person who might turn out to be the owner of it; and therefore, although the land was very important to them, they had the means of obtaining it, if not under this contract, in some other manner, either by agreement or by the exercise of compulsory powers; and on this ground, and because, after full knowledge of the Plaintiffs' incapacity to convey this land, the Defendants had gone on performing the contract and requiring the Plaintiffs to perform it, he held that the Defendants had incapacitated themselves from saying that this piece of land was so essential to be obtained under the contract, that the incapacity of the Plaintiffs to convey barred their right to specific performance as to the rest.

The head of defence which calls for a report was the second, which was as follows:—

On the 12th of June, 1879, the Defendants paid into Court, under the 76th section of the *Lands Clauses Consolidation Act*, a sum of £1167 10*s.* to the credit of the parties interested, and they subsequently executed a deed poll under the 77th section of the same Act in their own favour, and they contended that those Acts vested all the land in the board, and that the Plaintiffs ought to petition for payment out of the purchase-money, and were not entitled to go on with their action for specific performance after the Defendants had taken this course under the statute and pleaded it in the action. The £1167 10*s.* so paid into Court by the Defendants was based on the actual price of the whole land, including the site of the old ditch, as settled by arbitration, after allowing for a sum of £125 in respect of timber and trees, which sum was not paid into Court, but to the Plaintiffs, and for £35 in lieu of erecting substantial fences and gates, which sum was

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brought into account. The board also agreed to make certain roads as frontages to other property of the vendors, and it was provided that the arbitrators should take into account and make an allowance for any increased value which might be conferred on any building or land belonging to or to be retained by the vendors or either of them by reason of its abutting upon any of the proposed public roads, and should deduct such allowance, which was accordingly done. And, lastly, the board were to convey a certain right of way and a small piece of land to the Plaintiffs, and take down and leave them certain building materials as part of the compensation to be made to them, the value of which was to be ascertained and fixed by the arbitrators and to be deducted from the sum which would otherwise be payable by the purchasers to the vendors; which was accordingly done.

Cookson, Q.C., and *Nalder*, for the Plaintiffs:—

The Defendants are bound to carry out their contract as to the land to which we can make a title, and they can obtain the strip of land, which is not ours, either by agreement or by compulsory purchase.

Fischer, Q.C., and *Cozens-Hardy*, for the Defendants:—

The Plaintiffs held themselves out as owners of the strip of land, which they now confess themselves unable to convey, and the case comes therefore within sect. 76 of the *Lands Clauses Act*, by which, on payment of the purchase-money, which has been ascertained by arbitration, into Court to the credit of all parties who shall shew their title to the land, the land becomes vested in us, and we are no longer bound specifically to perform the original contract.

FRY, J.:—

The Defendants' second head of defence is based upon the 76th section of the *Lands Clauses Consolidation Act*, which provides that "if the owner of any such lands purchased or taken by the promoters of the undertaking, or of any interest therein, on tender of the purchase-money or compensation either agreed or awarded to be paid in respect thereof, refuse to accept the same,

or neglect or fail to make out a title to such lands, or to the interest therein claimed by him to the satisfaction of the promoters of the undertaking" (or in certain other contingencies which I need not refer to), "it shall be lawful for the promoters of the undertaking to deposit the purchase-money or compensation payable in respect of such lands, or any interest therein, in the bank." Thereupon they may execute a deed poll which vests all the rights of everybody in the promoters, and the Act enables every person who is entitled to the land to apply to the Court for payment out of the purchase-money. It appears to me that the Plaintiffs were not the owners of the land in question within the meaning of this section. It has been contended that the word "owner" there includes a person like the Plaintiffs, a person who confesses that he has no interest whatever in the land in question. If that were the true reading of the statute the effect would be very serious. For a person like the present Plaintiffs admitting he has no claim or interest in the land, and not being in possession of the land (and in this case it is not shewn that the Plaintiffs were in possession), might nevertheless agree with the promoters of an undertaking to sell that land to the company, and upon payment of the purchase-money arranged between the stranger and the promoters into the bank, the true owner of the land might be deprived of his property.

That is a conclusion at which I should arrive very unwillingly, and it is a conclusion which Lord *Hatherley*, when Vice-Chancellor, referred to with disapprobation in the case of *Douglass* v. *London and North Western Railway Company* (1). He says this: "It was argued that the Legislature may even have gone so far as to contemplate the case of a sale by a person having a positively bad title, and may have intended to provide that even upon such a sale the promoters of the company, not being satisfied with the title, should be at liberty to deposit the purchase-money to the credit of the vendors, of any other person whom they believe to be interested (describing them so far as they can do so), and of all other persons who may have that title which the vendor has failed to shew. But I think that cannot be the true construction of the section, for this reason: it is impossible to suppose

(1) 3 K. & J. 173, 179.

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that the Legislature could ever have contemplated that a person having a positively bad title, and who is merely in possession of land, should be at liberty, by his own agreement, to sell that land, and to fix the price adversely to another, who may possibly be in a position to recover in ejectment the very next day."

Now that language applies to the present case, with the exception that, in the case before the Vice-Chancellor, the person having no title was in possession, and here the person admitting he has no title does not appear to have been in possession. No doubt the section is difficult to construe, for this reason, that it refers to an owner who fails to make out a title; but it appears to me that the explanations suggested by the Vice-Chancellor, and the class of cases to which he construed those words as referring, put a reasonable construction upon it:—and further, it must be borne in mind that the failure to make out a title is a failure to make out a title to the satisfaction of the promoters, a failure which might take place although there might have been shewn an absolutely good title to the land. I hold, therefore, that the section does not apply to cases in which, by the common consent of both parties, it is ascertained that the person who sold the land has absolutely no interest whatever.

Besides this, the money paid into Court was the value of the hereditaments to be sold, less the allowance for the increased value which would be conferred upon the land of the vendor by reason of the making of the new roads (a benefit, be it observed, which would enure to the vendor, but, so far as appears, would not enure to the real owners of the strip of land in question). From that is deducted the value of the right of way and the price of land and materials, all of which went to the vendors and not to the owners of the strip of land. Therefore we have, in this case, a very complex consideration—a consideration partly consisting of money subject to certain deductions for benefits conferred upon the vendors, and partly consisting of conveyances of land and delivery of materials which are to be made to the vendors specifically. Now, how can a payment to be made into Court to bind all parties interested be available when the money is a part only of the consideration, and another and important part of the consideration flows, not to the owners of the land, whoever they may

turn out to be, but to the particular persons who now confess that they have no interest whatever in this strip of land.

It appears to me that, for that reason also, viz., that the payment of that sum is not the entire consideration, it is impossible that the 76th section could apply to a state of circumstances like the present.

I hold, therefore, that the argument which has been addressed to me fails, and that the Plaintiffs are entitled to a decree for specific performance.

Solicitors: *Whites, Renard, & Co.; E. Woodard.*

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[1879 S. 257.]

Jurisdiction — Preservation of Property — Mandatory Injunction — Mine — Pumping—Lease of Colliery—Usual Clauses—Reference to Chambers to settle Lease—Declaration that particular Clause is not to be inserted—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8—*Rules of Court*, 1875, *Order* LII., *r.* 3.

Under Order LII., rule 3, of the Rules of Court, 1875, the Court has power in a proper case to grant an interim injunction to restrain a defendant from ceasing to pump water out of a mine.

Independently of a special custom, a provision that the lessee shall be entitled to determine the lease when the mine is incapable of being worked at a profit is not a usual clause in the lease of a colliery:—

Held, on the evidence, that such a provision is not usual in a lease of a colliery in *Derbyshire*.

Lord Abinger v. *Ashton* (1) explained.

When the Court directs a reference to Chambers to settle the terms of a lease, it will, when convenient, at the same time make a declaration as to the insertion of a particular clause with regard to which an issue has been raised in the pleadings.

THIS was an action for the specific performance by the Defendant of an agreement to take a lease of a colliery from the Plaintiff. The Plaintiff also claimed an injunction to restrain the Defendant from permitting the colliery to be drowned or other irreparable

(1) Law Rep. 17 Eq. 358.

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injury to accrue thereto by reason of the Defendant's default in performance of his part of the agreement.

The agreement in question was dated the 5th of August, 1873, and by it the Plaintiff agreed to grant a lease to the Defendant of two seams of coal, called the *Blackshale* and the *Kilburn* seams, under the *Oakerthorpe* estate, in *Derbyshire*, for the term of thirty-one years, and the Defendant agreed to accept the lease. It was provided that the lessee should work the mines with due diligence, and that all provisions and covenants usual in leases of collieries should be introduced into the lease. Soon after the date of the agreement the Defendant was let into possession of the mines, and he continued to work them down to the 18th of April, 1879, when he ceased to raise any coal out of the *Blackshale* seam, and on the 29th of April he stopped pumping out the water. He had a few days previously given notice to the Plaintiffs of his intention to close the colliery and cease pumping.

The writ in the action was issued on the 20th of May, 1879, and the Plaintiff at once gave notice of motion on the 23rd of May for an injunction to restrain the Defendant from ceasing pumping, and from permitting any other irreparable injury to accrue to the mine by reason of default on the part of the Defendant in performing his obligations under the agreement, or for such other order as might be proper. The motion did not come on for hearing on the 23rd of May, and the hearing was afterwards delayed in consequence of the cross-examination of a witness, and the motion was not heard before the Long Vacation. The result was that the mine was drowned. Ultimately, on the 7th of November, the motion was by consent ordered to stand to the trial of the action.

This was the trial. The principal questions argued were, whether the costs of the motion ought to be costs in the action, and whether the lease ought to contain a proviso enabling the lessee to determine the lease in the event of its being impossible to work the mines at a profit. Evidence was adduced on both sides upon the question whether such a proviso was a usual clause.

Cookson, Q.C., and *Colt*, for the Plaintiff:—

Even before the *Judicature Act* the Court would have had juris-

diction to restrain the Defendant from discontinuing the pumping: *Lane* v. *Newdigate* (1); *Storer* v. *Great Western Railway Company* (2); *Goodson* v. *Richardson* (3); *Nuneaton Local Board* v. *General Sewage Company* (4); *Cooke* v. *Chilcott* (5). At any rate, there is now jurisdiction to grant such an injunction: *Judicature Act*, 1873, s. 25, sub-s. 8; Rules of Court, 1875, Order LII., rule 3; *Beddow* v. *Beddow* (6); *Hedley* v. *Bates* (7). The injunction ought to be granted until the execution of the lease. The motion was a proper one to make, and the Plaintiff ought to have the costs of it as costs in the action. The question whether the lease ought to contain the proviso insisted on by the Defendant should be decided now, even though it be referred to Chambers to settle the terms of the lease. The question whether such a proviso is usual has been distinctly raised in the pleadings: *Henderson* v. *Hay* (8); *Blakesley* v. *Whieldon* (9).

North, Q.C., and *F. Thompson*, for the Defendant:—

The Court has no jurisdiction to grant such an injunction. In *Rolleston* v. *New* (10) it was assumed that there was no such jurisdiction. *Beddow* v. *Beddow* is not an authority that the principles on which the Court acts in granting injunctions have been altered by the *Judicature Act*. *Day* v. *Brownrigg* (11) shews that the principles remain the same. *Cooke* v. *Chilcott* is distiuguishable. If the Plaintiff would not have been entitled to an injunction to compel us to go on pumping for the whole term of the lease, he cannot give the Court jurisdiction merely by asking for an injunction for a shorter time. In *Lane* v. *Newdigate* the injunction was granted on an interlocutory motion. It would be an entire novelty to make such an order at the trial.

[FRY, J.:—I do not see my way now to restrain the Defendant from discontinuing the pumping until the execution of the lease. The Plaintiff consented to the motion standing over to the trial, and thus practically abandoned it. But I am disposed to think

(1) 10 Ves. 192.
(2) 2 Y. & C. Ch. 48.
(3) Law Rep. 9 Ch. 221.
(4) Ibid. 20 Eq. 127.
(5) 3 Ch. D. 694.
(6) 9 Ch. D. 89, 92.
(7) 13 Ch. D. 498.
(8) 3 Bro. C. C. 632.
(9) 1 Hare, 176.
(10) 4 K. & J. 640.
(11) 10 Ch. D. 294.

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that the Plaintiff is entitled to the costs of the motion, because it was properly made at the time with a view to the interim preservation of the property.]

The object of a mining lease is the mutual profit of the lessor and the lessee. The lessee ought not to be compelled to go on working when no profit can be made. The evidence shews that it is usual in mining leases to insert a clause enabling the lessee to determine the lease under such circumstances, and independently of any custom this would be reasonable: *Gowan* v. *Christie* (1); *Lord Abinger* v. *Ashton* (2); *Wheatley* v. *Westminster Brymbo Coal Company* (3); *Smith* v. *Morris* (4).

FRY, J.:—

It is not now in dispute that the Plaintiff is entitled to judgment for the specific performance of the agreement, and that will carry with it the general costs of the action. Two questions remain for decision. The first arises upon the motion. Now, what happened with regard to the motion is this,—evidence was filed on the part of the Plaintiff on the 22nd of May, 1879, and on the 27th, 28th, and 29th of May affidavits were filed on the part of the Defendant, and those affidavits set up a twofold defence to the entire action. The first defence was that no *Kilburn* coal existed under the *Oakerthorpe* estate, and the other was, that under the stipulation in the agreement that the usual clauses should be inserted in the lease it would be necessary to insert a power for the lessee to determine the lease in the event of the mines being found incapable of being worked at a profit; that such had been found to be the case, and that accordingly the Defendant was in a position to put an end to the lease. These were serious contentions on the part of the Defendant, and they placed the Plaintiff in this difficulty. If things were allowed to go on as they were the mine would be drowned out, and if the Defendant was successful the Plaintiff would find in the result that he had returned upon his hands a drowned-out colliery. On the other hand, if the Defendant, who had been pumping down to April,

(1) Law Rep. 2 H. L., Sc. 273.
(2) Ibid. 17 Eq. 358.
(3) Law Rep. 9 Eq. 538.
(4) 2 Bro. C. C. 311.

was required by the Court to go on pumping until the hearing, he would only be required to do that which he had been doing for some years past, and which could be done at a small expense. The affidavits of the Defendant were replied to by the Plaintiff on the 7th of June; thereupon followed a cross-examination of the witnesses, and in the result the cross-examination of the principal witness was not completed till the beginning of the present year. Things taking that turn, it was arranged between counsel that the motion should stand over until the hearing, and that was accordingly directed in November, 1879. In order to determine whether the Plaintiff is entitled to the costs of that motion as part of the costs of the action, it appears to me that I must decide whether, at the time when the notice of motion was given, and looking at the nature of the defences set up, the motion ought to have been acceded to, and would have been acceded to by the Court if it had then come on to be heard. In my judgment it would have been acceded to. As I have already pointed out, the Plaintiff was in a position of considerable difficulty. He had no means himself of doing the pumping, because the colliery was in the possession of the Defendant. He was in any event seriously interested in the continuing of the pumping, because if the Defendant should succeed the colliery would become the Plaintiff's. Therefore in the meantime he was in that position of difficulty. In my judgment rule 3 of Order LII. is addressed to that very kind of difficulty. It provides that "it shall be lawful for the Court or a Judge upon the application of any party to an action, and upon such terms as may seem just, to make any order for the detention, preservation, or inspection of any property being the subject of such action." That the drowning out of this colliery tended to its destruction can hardly be doubted from the mere statement of the fact, but the evidence upon the point is ample. It shews that the effect of it was singularly injurious to the value of the colliery. And, under all the circumstances, having regard to the contract between the parties, and the course of conduct of the Defendant —continuing the pumping down to April, 1879—to the nature of the defences which he set up, the difficulty in which the Plaintiff was placed, and the very small injury (if any) which would have resulted to the Defendant by his being required to continue the

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pumping, and the power of the Court to provide against his suffering any injury by requiring the Plaintiff to make some payment into Court, or to undertake to make some payment in the event of the Court ultimately thinking that the order ought not to have been made,—considering all these things, I think that the order would have been made upon the motion if it had come on for hearing in the ordinary course shortly after the notice was given. Therefore, according to my judgment, the costs of the motion must be costs in the cause.

The other question which remains for determination is whether it is usual for leases of collieries to contain a provision to the effect that, when the mines demised are incapable of being worked to a profit, the lessee should be entitled to determine the lease. The burden of proof, in my judgment, rests on those who assert that such a clause is usual.

[His Lordship referred to the evidence on the point.]

I cannot on the evidence come to the conclusion that such a clause is usual. On the contrary, the weight of evidence seems to me very distinctly with the Plaintiff, who denies the Defendant's proposition. Two other arguments have been urged. In the first place it appears that such a clause is not uncommon in *Scotland*, and the observations of one of the noble Lords in *Gowan* v. *Christie* (1) were referred to. But the practice in *Scotland* and in *England* is very different in many respects in regard to dealings in landed property and mines, and it is impossible for me to hold the one practice to be a precedent for the other, or an authority binding upon me. The other argument was derived from the observations of the Master of the Rolls in *Lord Abinger* v. *Ashton* (2). But he was there dealing with the proper construction to be put upon a covenant to work mines, and he pointed out that an unreasonable construction had been contended for, which might require the lessee to work at a continuous and regular loss. The difference between that and the present argument is very plain. There the Master of the Rolls was only shewing that, during the continuance of the lease, the lessee might not be under any obligation to do more than pay the dead rent; he might be under no additional obligation to work at an actual loss. Here

(1) Law Rep. 2 H. L., Sc. 273. (2) Law Rep. 17 Eq. 358.

the contention is that the lessee, if he cannot work at a profit, has a right to escape from the payment of the dead rent which is reserved during the term. That argument, as it appears to me, is resorted to simply because no better can be adduced, and it is one which cannot possibly succeed in inducing me to hold that such a clause is usual. The two things are plainly very different. Therefore, weighing the whole argument, as well as the evidence before me, I come to the conclusion that the Defendant has not supported the contention which he has raised in his defence, and that, on the contrary, the Plaintiff is right in denying that it is usual to insert such a clause. I shall therefore direct specific performance of the agreement, with the usual reference to Chambers to settle the lease in case the parties differ, except that I shall make a declaration that the Defendant is not entitled to require a clause to be inserted to the purport or effect that, if the mine is not capable of being worked at a profit, the lessee shall be entitled to determine the lease. I direct that the costs of the motion are to be costs in the cause. I ought to add this. When the case was opened I was asked to grant an injunction during the interval between the present time and the execution of the lease. For the reason which I have already pointed out, I cannot accede to that view. It was agreed between counsel as long ago as November last that the motion should stand over. The result was that the Plaintiff did not any further urge the pumping until the trial. To require the Defendant to begin again the pumping which has ceased for more than a year, would, in my opinion, be useless and undesirable, and for that reason I do not accede to the application that the injunction should be granted in the interval until the execution of the lease.

Solicitors for Plaintiff: *Aldridge, Thorn, & Morris,* agents for *Harris & Morton, Halstead.*

Solicitors for Defendant: *Norris, Allens, & Carter,* agents for *J. P. Gardner, Cannock.*

DENMAN, J.

1880

July 8.

WEBSTER *v.* WHEWALL.

[1879 W. 358.]

Discovery—Document of Title—Refusal to produce—Admission as Evidence—Rules of Court, 1875, *Order* XXXI., *rr.* 14, 17.

A plaintiff cannot generally be compelled to produce to the defendant a document relating to his own title only, though such document is referred to in his pleadings, until the defendant has put in his defence.

A plaintiff who in his pleadings referred to a document on which his title depended and declined to produce it to the defendant before statement of defence was put in, was held to have "sufficient cause for not complying with the notice" to produce under Order XXXI., rule 14, of the Rules of Court, 1875.

THIS was an action in which the Plaintiff sued in respect of alleged trespass, and interference with ancient lights, and in his statement of claim he referred to a deed of the 16th of August, 1866, as one of his principal title deeds.

The Defendant gave notice, under Order XXXI., rules 14, 15, of the Rules of Court, 1875, that he required to inspect the deed so referred to.

The Plaintiff declined to produce the deed until after the Defendant had put in a statement of defence.

At the hearing the Plaintiff tendered the deed in evidence, but the Defendant contended that it could not be admitted, because the Plaintiff not having complied with the Defendant's notice was by the 14th rule expressly prevented from reading it at the trial. The words of the 14th rule being that "a party not complying with such notice shall not afterwards be at liberty to put such document in evidence, unless he shall satisfy the Court that such document relates only to his own defence, he being a defendant to the action" (whereas here he was Plaintiff), "or that he had some other sufficient cause for not complying with such notice."

North, Q.C., and *Yate Lee*, for the Defendant, took the objection:—

The words of the rule are clear. If the discovery had been refused by a defendant he might have sheltered himself by saying

it related to his own title only, but by the 14th rule that defence is allowed only to a defendant.

Cookson, Q.C., and *W. Barber*, for the Plaintiff:—

The reason we did not produce this deed was, that it relates to the Plaintiff's title only; it would be contrary to the practice of the Courts, as exemplified in the now obsolete 20th section of the *Chancery Procedure Act*, 1852 (15 & 16 Vict. c. 86), and other rules, to enforce discovery from a plaintiff before a defendant puts in his defence.

Also, under rule 17 of Order XXXI., the Defendant might have applied to a Judge, if he thought discovery was wrongly refused.

North, in reply.

DENMAN, J.:—

It would be too rigid an interpretation of the rules to exclude this evidence, especially as it relates to the Plaintiff's title only. Even if that is not a sufficient reason for protection, the current of decision is in favour of not allowing a defendant free access to documents or discovery from the plaintiff until he has put in a defence. I hold this a "sufficient cause" under rule 14. Until such defence was put in, it was not certain that the Defendant would put in any defence, or would be entitled to any discovery. Besides, the Defendant had a remedy under the 17th rule, if he considered the Plaintiff was wrong in his refusal, and he ought not to have waited to the trial of the action to exclude so material a document. The Defendant's objection must, therefore, be disallowed.

Solicitors for Plaintiff: *Williamson & Hill.*
Solicitors for Defendant: *Philbrick & Corpe.*

DENMAN, J.

1880

July 12, 13,

BALLARD *v.* SHUTT.

[1878 B. 904.]

Vendor and Purchaser—Interest on Purchase-Money—Possession by Purchaser —Delay by Vendor—Vacant Land.

A purchaser who before completion of the purchase exercises acts of ownership over the land agreed to be purchased must pay interest on the purchase-money pending delay in the completion of the contract, although the delay be caused by the vendor and the land is untenanted, so that he receives no rents nor profits from it.

THIS was an action by a purchaser for the specific performance of an agreement to sell land situate near *Accrington.*

It was admitted that there must be a decree for specific performance of the contract set out and sued upon. But the Defendant contended that the Plaintiff was bound to pay interest on the purchase-money from the 28th of January, 1875, on which day the Defendant alleged that possession was taken by the Plaintiff, and on this point the Plaintiff joined issue.

The evidence on this point shewed that the Plaintiff had put up a notice-board on the land announcing that it was to be let or sold for building purposes, and that application for information should be made to him, and had negotiated some contracts with reference to the land, but he had never entered into actual possession of the land, nor received any rents or profits from it, the land being waste or building land, of which one *George Barlow* (who made an affidavit in the action to that effect) had for several years had the free use as a run for poultry and other domestic purposes, without paying any rent to any one for it.

Cookson, Q.C., and *Stock*, for the Plaintiff:—

Where delay is attributable to the default of the vendor, the purchaser is not bound to pay interest on his purchase-money, unless he has entered into possession of the rents and profits, which is not the case here: *Dart's* Vendors and Purchasers (1);

(1) 4th Ed. vol. ii. pp. 575, 576.

Birch v. *Joy* (1); *Powell* v. *Martyr* (2); *Sherwin* v. *Shakspear* (3); *Binks* v. *Lord Rokeby* (4).

North, Q.C., and *Hamilton Humphreys*, for the Defendant:—

The Plaintiff did take possession by exercising acts of ownership: *Dart's* Vendors and Purchasers (5); *Fludyer* v. *Cocker* (6); *Attorney-General* v. *Christchurch, Oxford* (7). A railway company has to pay interest from the time they take possession under their compulsory powers, although the price is fixed later: *Rhys* v. *Dare Valley Railway Company* (8).

Cookson, in reply.

DENMAN, J., after stating the matter in dispute, continued:—

I think that the Plaintiff was in his right when he brought the action for specific performance, and that he remained in the right down to the time when he declined to pay interest on the purchase-money; at least so far as any defence raised in the action is concerned. But upon the main question argued before me, viz., whether the Plaintiff is liable to interest on the purchase-money from the 28th of January, 1875, I am of opinion that he is so liable. It appears that as soon as the agreement was signed he erected a notice-board on the land announcing that it was to be let or sold, and referring to himself for information, and that he actually entered into contracts relating to the land. Putting the best construction I can upon the evidence, I come to the conclusion that he did this intending then and there to assume the ownership of the land and to deal with it as his own.

It was said that the rule of equity that the purchaser shall pay interest on the purchase-money from the time he takes possession does not apply to this case, because there was no profit by the Plaintiff out of the land.

I can find no such distinction drawn in the cases upon the subject. It is true that in many of the cases, notably in *Birch*

(1) 3 H. L. C. 565.
(2) 8 Ves. 146.
(3) 5 D. M. & G. 517.
(4) 2 Sw. 222.
(5) 4th Ed. vol. ii. p. 578.
(6) 12 Ves. 25.
(7) 13 Sim. 214.
(8) Law Rep. 19 Eq. 93.

DENMAN, J. 1880 BALLARD v. SHUTT.

v. *Joy* (1), the purchaser was not only in possession, but also in actual receipt of rents and profits; but where possession of land of which there are no tenants is taken by a purchaser pending delay in the completion of the purchase, even though such delay be attributable to the vendor, especially where, as in the present case, he takes possession with a view to making a profit out of the land, I apprehend there is the same reason as in the other case that the vendor should not remain without the land and also without interest upon his purchase-money.

The doctrine that possession by the purchaser cannot give the vendor a right to interest unless profit is actually made, seems to me to be inconsistent with the case of *Rhys* v. *Dare Valley Railway Company* (2), founded as that case is not merely on the ground of the statute, but upon the authority of *Fludyer* v. *Cocker* (3) and *Attorney-General* v. *Christchurch, Oxford* (4); in both of which it was in effect held that the taking of possession carries with it the liability to interest in the absence of any stipulation to the contrary.

I think, therefore, that the Plaintiff was wrong in insisting upon his non-liability to interest, and inasmuch as it is clear that the whole of the proceedings subsequent to the date when he so insisted have been occasioned by his own mistake in that respect, and that he might have obtained the whole object of his suit at that time with all costs then incurred, I think it would be unjust to saddle the Defendant with any costs incurred subsequently to that date.

Solicitors for Plaintiffs: *Dixon, Ward, Letchworth, & Weld.*
Solicitors for Defendants: *Johnson & Wetherall.*

(1) 3 H. L. C. 565.
(2) Law Rep. 19 Eq. 93.
(3) 12 Ves. 25.
(4) 13 Sim. 214.

Ex parte TYNTE. *In re* TYNTE.

C. J. B.
1880
May 31.

Bankruptcy—Annulling Adjudication on Equitable Grounds—Creditor's Suit—Bankruptcy Act, 1869, s. 8—*Real Property Limitation Act*, 1874 (37 & 38 *Vict.* c. 57), s. 8.

A judgment creditor is not entitled, after the expiration of twelve years without payment of interest or acknowledgment of his right, to obtain an adjudication in bankruptcy against the debtor, though within the twelve years a suggestion has been entered on the roll under the *Common Law Procedure Act*, 1852, s. 129.

APPEAL from an order of the *Exeter* County Court adjudicating the Appellant, Colonel *C. J. Kemeys Tynte*, a bankrupt.

In January, 1862, *Henry Gibbon*, the petitioning creditor, obtained judgment against Colonel *Tynte* for £1740, the sum due for principal, interest, and costs upon a bill of exchange for £1000 given by Colonel *Tynte* in 1861. The judgment was registered on the 30th of January, 1862, and re-registered in January 1867, 1872, and 1877. A *fi. fa.* was issued on the 26th of January, 1867, and pursuant to a Judge's order dated the 3rd of July, 1868, a suggestion upon the roll, to the effect that *Gibbon* was entitled to have execution, was entered under the *Common Law Procedure Act*, 1852, s. 129. On the 20th of July, 1868, a writ of *ca. sa.* directed into *Middlesex* was issued, but Colonel *Tynte*, whose affairs were in great confusion, had gone abroad, and *Gibbon* was unable to obtain satisfaction of his debt.

In March last, *Gibbon* having discovered that Colonel *Tynte* had returned to this country and was residing at *Torquay*, issued a debtor's summons, which was served on the 23rd of March, for the amount of his judgment debt.

On the expiration of the three weeks required by the *Bankruptcy Act*, 1869, s. 6, sub-s. 6, *Gibbon* presented a petition for obtaining an adjudication in bankruptcy against Colonel *Tynte*, and upon that petition Colonel *Tynte* was on the 30th of April, 1880, adjudicated a bankrupt by the Registrar of the *Devon* County Court held at *Exeter*.

It appeared that the only property of which Colonel *Tynte* was

C. J. B. 1880 *Ex parte* TYNTE. *In re* TYNTE.

possessed was a life interest, heavily incumbered, in certain settled estates in the counties of *Somerset*, *Monmouth*, *Glamorgan*, and *Brecon*, to which he became entitled on the death of his father in 1860.

In 1858 a suit of *Ford* v. *Tynte* [1858 F. 15] was instituted by an incumbrancer for the purpose of enforcing his charge, and settling the rights and priorities of the various incumbrancers upon Colonel *Tynte's* life estate. Other suits for the same purpose were instituted by other incumbrancers. Inquiries and accounts were directed, and on the 26th of February, 1866, an order was made in *Ford* v. *Tynte* for the allowance of a moiety of certain mineral rents to the wife of Colonel *Tynte* for her separate use, to be applied for the maintenance and support of herself and her children.

Colonel *Tynte* was now upwards of eighty years old, and since his return to *England* had lived in a house at *Torquay* which belonged to one of his daughters, and had no means beyond the allowance to his wife and daughters made by the order of February, 1866.

At the hearing before the Registrar it was objected on behalf of Colonel *Tynte* that he had no assets whatever except his life interest, which was being administered for the benefit of his creditors in the suits of *Ford* v. *Tynte;* and *Gibbon*, the petitioning creditor, on being examined, admitted that he was aware of the existence of the suit of *Ford* v. *Tynte*, but could not state when he first knew of its existence.

The Registrar, upon his attention being called to the proceedings in *Ford* v. *Tynte*, was of opinion that they had not been sufficiently verified, and made an order adjudicating Colonel *Tynte* a bankrupt.

From that order Colonel *Tynte* now appealed.

Winslow, Q.C., and *R. Vaughan Williams*, in support of the appeal:—

1. *Gibbon*, who has admitted that he was aware of the existence of the suit of *Ford* v. *Tynte*, is not entitled, by presenting a petition for adjudication, to interrupt the proceedings in that suit, under the decree in which he might have come in and, as a creditor

holding a charge upon the land of his debtor, have obtained payment of his debt. Colonel *Tynte* has no assets whatever beyond his life interest, and the only effect of making him bankrupt will be materially to interfere with the prospects of payment in *Ford* v. *Tynte*.

2. *Gibbon* has no legal or equitable right in respect of his debt. His claim as a judgment creditor who is seeking to recover money due upon a judgment after the expiration of twelve years without payment of interest or acknowledgment of his right, is barred by the *Real Property Limitation Act*, 1874 (37 & 38 Vict. c. 57), s. 8; and if prevented by the statute from recovering his debt at law or in Equity, he has no better right in bankruptcy.

Horton Smith, Q.C., and *Finlay Knight*, for the petitioning creditor:—

The suit of *Ford* v. *Tynte* was a mortgagee's suit, but *Gibbon* was not a mortgagee of Colonel *Tynte*, and had no notice of the suit. It is not shewn that Colonel *Tynte* has no assets, and the mere existence of that suit is no ground for annulling the adjudication. Although in a proper case the Court might interfere, by discharging the adjudication, to prevent wrong being done, the order is *ex debito justitiæ* where there has been no fraud upon the bankrupt laws, and the requirements of the statute as to proof have, as here, been strictly complied with: *Ex parte Claxton* (1); *Bankruptcy Act*, 1869, ss. 7, 8.

The *Real Property Limitation Act*, 1874, s. 8, has no application, as it only deals with money charged upon land, or a legacy, and *Gibbon's* claim is in respect of neither one nor the other. He is simply seeking to get payment of his debt, and, as the only means open to him, has issued a debtor's summons as soon as he found that his debtor was in this country. Even if this debt is secured upon land within sect. 7, the Act does not apply, as the judgment was revived in July, 1868, by the suggestion entered upon the roll under the *Common Law Procedure Act*, 1852, s. 129.

BACON, C.J.:—

I think this is a very improper proceeding. I cannot doubt that

(1) Law Rep. 7 Ch. 532.

C. J. B. 1880 *Ex parte* TYNTE. *In re* TYNTE.

the petitioning creditor was fully aware of the suit of *Ford* v. *Tynte*, and other suits instituted for the purpose of making available for judgment creditors and mortgagees the only property that Colonel *Tynte* had, that is to say, his life interest in the settled estate, and therefore it is also a decree for the benefit of the judgment creditors. The petitioning creditor, knowing quite well that there was a decree made in his favour, and that if the proceeds should be enough to satisfy all the charges that preceded his, he would get paid, has not thought fit to come in under that decree. Then after all these years he attempts to make this gentleman a bankrupt in order to have the proceedings transferred to the jurisdiction of bankruptcy—the most preposterous notion that ever came into any one's head. It is not suggested, and there is no evidence, that Colonel *Tynte* has any other assets. The facts are clear. The proceedings in *Ford* v. *Tynte* were referred to before the learned Registrar, and his observation was that they had not been verified before him. They might have been verified if that was the objection, and if that formality had been fulfilled then it would have been plain that there was no estate other than that included in the suit of *Ford* v. *Tynte*, and therefore no hope of payment to this creditor until the creditors in the Chancery proceedings should have been satisfied. Sect. 7 of the *Bankruptcy Act*, 1869, which was referred to, deals with the power which a debtor's summons gives. But sect. 8 also provides that if the Court is satisfied with the proof of the debt of the petitioning creditor, and of the other requisites, it "shall adjudge the debtor to be bankrupt. The Court may adjourn the petition either conditionally or unconditionally, for the procurement of further evidence, or for any other just cause, or may dismiss the petition with or without costs." A subsequent section provides for the establishing at law of a debt which is disputed. Now here the debt was entirely disputed at law. Reference was made to the *Real Property Limitation Act*, 1874, s. 8, which limits the power of proceeding upon any judgment to the period of twelve years therein mentioned. It is said on behalf of the petitioning creditor that this Act only relates to charges upon land. A judgment is a charge upon land, and may be made so by any person in whose favour the judgment has been obtained; and the words of the statute are—"No action,

or suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, &c., but within twelve years next after a present right to receive the same shall have accrued . . . unless in the meantime some part of the principal money or some interest thereon shall have been paid or some acknowledgment of the right thereto shall have been given in writing." That is the answer to this case. The matter was before the Registrar, and he ought either to have remitted the case for further inquiry, or have directed an action to have been brought—the plea to which action would have been furnished by the enactment I have referred to—or he ought to have required further evidence. If any objection were taken before him that the copies of the proceedings were not sufficient evidence, that could have been cured readily. In my opinion there ought to be no such proceedings as have been here attempted. It is not suggested that any assets can be recovered. It is not suggested that Colonel *Tynte* has any means other than those which might be furnished by that suit, and as to which the present petitioning creditor has all the benefit by law that he can claim. The period of twelve years having elapsed, he has no right to take any proceedings upon his judgment, and that is in itself sufficient objection, if there were no other, to this adjudication. The adjudication must, therefore, be annulled with costs.

Solicitors: *Baker, Folder, & Upperton; Langley & Gibbon.*

C. A.
1880
M. R.
Feb. 14.
C. A.
May 8, 10.

WARD *v.* EYRE.

[1872 W. 119.]

Country Solicitor and London Agent—Suit for Account—Demand of Interest on Debt—Interest on Disbursements—3 & 4 *Will.* 4, *c.* 42, *s.* 28—33 & 34 *Vict. c.* 28 (*Attorneys and Solicitors Act*, 1870), *ss.* 3, 17.

Notwithstanding the definition of the word "client" in sect. 3 of the *Attorneys and Solicitors Act*, 1870, that Act does not apply to accounts between country solicitors and their town agents.

The Act is not retrospective, and therefore interest cannot be allowed under sect. 17 on disbursements made prior to the passing of the Act.

In May, 1872, a country solicitor commenced a suit against his *London* agent, claiming an account and taxation of the bills of costs between them. The Defendant filed his answer in October, 1872, and thereby alleged a large balance due to him and claimed interest thereon. He had also, in 1869, furnished the Plaintiff with an account which contained items for interest. In 1875 a copy of the account was inclosed in a letter which referred to the account, but made no formal demand of payment, and which was signed by a firm of solicitors as his agents :—

Held, that neither the answer nor the letter inclosing the account was a sufficient demand in writing or notice within 3 & 4 Will. 4, c. 42, s. 28.

THIS suit was commenced in May, 1872, by a country attorney against his *London* agents for an account of the business transactions between them, and for taxation of the Defendants' bills of costs.

The Defendants, *Eyre & Lawson*, had been co-partners in business, and had from the year 1859 down to September, 1867 (when the partnership was dissolved), transacted business for the Plaintiff on the usual agency terms.

The Defendant *Lawson* filed his answer on the 28th of October, 1872, and therein stated that a sum of £1515 5*s.* 6*d.* was due from the Plaintiff to the late firm of *Eyre & Lawson*, "on which interest is claimed by me;" and that on the 30th of September, 1869, his late firm rendered a cash account to the Plaintiff, in which they claimed from the Plaintiff the sum of £1515 5*s.* 6*d.* as the balance due to them "with interest as aforesaid."

The Defendant *Eyre* filed his answer in 1873, whereby he claimed the same sum of £1515 5*s.* 6*d.*, but did not claim interest thereon.

In June, 1873, a decree was made, directing various accounts, which concluded thus: "Any of the parties are to be at liberty to apply as there may be occasion."

On the 19th of November, 1875, a letter, signed by *G. L. P. Eyre & Co.*, who were acting as solicitors for both the Defendants in the suit, was sent to the Plaintiff, inclosing a copy of the account, and adding, "The question of interest was submitted to Mr. *Lawson*, who referred the matter to Mr. *Warriner*, and the latter wrote in reply, 'I think interest should be claimed upon the disbursements from the date of the respective payments, and interest upon the balance from the date of your answer. 28th October, 1872.'"

This sum of £1515 5*s.* 6*d.*, which was afterwards agreed at £1410 7*s.* 3*d.*, was the balance on the agency account from the year 1859 to 1867, and in taking the account under the decree the Defendant *Eyre* took out a summons claiming—

(1.) Interest on this balance from the 28th of October, 1872, the date of the filing of the answer of the Defendant *Lawson*, or from the date of the delivery of the account, on the ground that either the answer or the letter inclosing the account was a sufficient demand or notice in writing within 3 & 4 Will. 4, c. 42.

(2.) Interest on disbursements made during the same period under sect. 17 of the *Attorneys and Solicitors Act*, 1870.

The summons was adjourned into Court, and came on for hearing before the Master of the Rolls on the 14th of February, 1880.

Bagshawe, Q.C., and *B. Eyre*, for the summons.

Ince, Q.C., and *Millar*, for the Plaintiff.

JESSEL, M.R.:—

This claim entirely depends upon whether a demand in writing was made within the 28th section of the Act 3 & 4 Will. 4, c. 42, and therefore the requirements of that section must be considered. It enacts that interest may be allowed upon all debts or sums certain, payable at a certain time or otherwise, from the time when such debts or sums certain were payable, if such debts or sums certain were payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time

C. A. 1880 WARD v. EYRE. M. R.

when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment. Now it appears to me that none of the requirements of the statute have been complied with in this case. First of all, there must be a debt or sum certain payable; secondly, there must be a demand of payment in writing by some one, which I take to mean the creditor or his agent; and lastly, the demand must give notice that interest will be claimed from the date of such demand until the time of payment.

Now, what is here relied upon is, first, a statement in the answer of Mr. *Lawson*, whose position was this. He had been a partner with Mr. *Eyre*, and then they dissolved partnership. During the partnership they were the town agents of Mr. *Ward*, the Plaintiff, and during that partnership Mr. *Ward* incurred liabilities to the firm of Messrs. *Eyre & Lawson* in respect of such town agency, and there was and is a balance due from Mr. *Ward* to Messrs. *Eyre & Lawson* in respect of business done. But the partnership was dissolved previously to the time of this answer being put in, and this is the answer of Mr. *Lawson* alone, and he says this, "I told him" (that is the Plaintiff), "my firm would look to the company for payment of the costs then already incurred in respect of the business of the company." Then in a subsequent paragraph he states, "We have long since delivered to the Plaintiff our bills in respect of those costs and charges, and in respect of our agency, costs and charges, and there is due to my late firm from the Plaintiff upon such bill the sum of £1515 5*s.* 6*d.*, on which interest is claimed by me." This of course is an answer in writing, and signed and sworn to by the Defendant. Then in another paragraph he says, "We did on such last-mentioned day (that is, the 30th of September, 1869), render to the Plaintiff a cash account in which we claim from the Plaintiff the sum of £1515 5*s.* 6*d.* as the balance due, and which is still in fact due to the said firm of *Eyre & Lawson*, with interest as aforesaid." There is not a word to shew from what date the interest is claimed, except it be from the 30th of September, 1869. It is not a claim for interest from the date of the answer. Now, in the first place, Mr. *Lawson* was not a creditor. Messrs. *Eyre & Lawson* were the

creditors, and therefore the demand was not made by the person entitled to make the demand. In the next place, it is not a demand for payment. An answer to interrogatories saying the sum is due is not a demand at all. Further, it is a claim for the balance of an account, which turns out not to be the right sum, and a demand for the balance of an account is not a "debt or sum certain payable" within the statute. It must depend on taking the account whether the balance claimed shall ultimately turn out right. If it turned out that the balance was quite right I do not know exactly how it would be, but it is not a demand of a sum certain. It is not a demand for interest from the date of the demand till payment, but certainly from a back day interest is not payable under the statute, and therefore if you say, I give you notice to pay me now, and I claim interest from this day, the claim from a back day is not what the statute contemplated. The debtor says, I am not liable to that, and therefore it is a notice of a claim for interest in some other way. The only other demand which it is necessary to consider at all is a letter of the 19th of November, 1875, which is signed *G. L. P. Eyre & Co.*, which firm did not contain Mr. *Lawson* as a member, but were then acting as solicitors for both the partners in the late firm of *Eyre & Lawson*, and they say this: "We now enclose statement of account shewing amounts of the railway bills chargeable to you in agency, and the balance in which you stand indebted to the late firm. The question of interest was submitted to Mr. *Lawson*, who referred the matter to Mr. *Warriner*, and the latter wrote in reply, 'I think interest should be claimed upon the disbursements from the date of the respective payments and interest upon the balance from the date of your (Mr. *Lawson's*) answer, 28th of October, 1872.' We also again enclose you the particulars of your claim for allowance with our further remarks thereon. We make these replies out of courtesy, but must protest against being asked to go into such matters so many years after the bills have been delivered." Now, this letter written by the solicitors of the creditors is not a demand for payment. It is a giving of information out of courtesy in answer to a request, but it is no demand for payment at all. Then there was inserted in this letter an account which, had it not been inclosed in the letter, might have done. The account con-

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tains this statement: "Interest is also claimed on agency costs on railway matters in proportion for the same period, &c." But that statement when coupled with the letter is not a demand for payment, nor a notice that interest will be charged if the amount due is not paid. Therefore you have no demand of payment and no notice claiming interest, but besides that, the debt is not a sum certain, but a claim for the balance of the account that turns out to be inaccurate. The case is clearly within the decision of Vice-Chancellor *Hall* in *Hill* v. *South Staffordshire Railway Company* (1). Then the only other point is the claim for interest under the *Attorneys and Solicitors Act*, 1870, which says (s. 17), that subject to the general rules the taxing officer may allow interest at such rate and from such time as he thinks just on moneys disbursed by the attorney or solicitor for his client. That has nothing to do with an account as between principal and agent, and one cannot say that a country solicitor and his town agent occupy the position of solicitor and client. The Act does not apply to accounts between country solicitors and town agents. The reason why a town agent is given half the profits is on account of his disbursements. He is not to get interest and profits too. He shares the profits because he pays money out of pocket, and the Act of Parliament is not intended to interfere with this business arrangement. It has no application to the case of taking an account between a country solicitor and a town agent either in words or in spirit.

C. A.

The Defendant *Eyre* appealed. The appeal came on to be heard on the 8th of May.

Bagshawe, Q.C., and *B. Eyre*, for the Appellant:—

We contend that there was a sufficient demand for interest under 3 & 4 Will. 4, c. 42: *Berrington* v. *Phillips* (2).

[JAMES, L.J.:—Is there any authority in favour of your obtaining interest by a demand after a decree for account? The claim seems inconsistent with the decree.]

Mildmay v. *Methuen* (3) is in our favour on that point.

(1) Law Rep. 18 Eq. 154. (2) 1 M. & W. 48.
(3) 3 Drew. 91.

[JAMES, L.J. :—There was no decree for an account there.]

Mackintosh v. *Great Western Railway Company* (1) supports our case. The decree said nothing about interest, yet interest was allowed. The Master of the Rolls appears to have gone on the ground that we claimed interest from a prior date. This, no doubt, was claiming too much, but it does not make the demand bad: *Mowatt* v. *Lord Londesborough* (2). In *Hill* v. *South Staffordshire Railway Company* (3) interest was refused, but *Mowatt* v. *Lord Londesborough* was not cited. *Geake* v. *Ross* (4) shews that a very informal demand is sufficient. A summons, though not signed, is a sufficient demand: *Ex parte Alison* (5). In each of the documents relied on there is a clear intimation that interest is claimed, and that, we submit, was sufficient. The £1407 agreed upon was a compromise as to the principal sum due, and an application for interest may be made after a decree for payment of the principal: *Goodyere* v. *Lake* (6); *Sammes* v. *Rickman* (7). Further, the words "liberty to apply for payment" are in fact equivalent to a reservation of further consideration in Chambers, and enables us when applying for payment of the principal to apply for interest also. Then as to interest on disbursement, the word "client" in the 3rd section of the Act clearly includes a country solicitor. There is no privity between the client in the country and the *London* solicitor, but it is the country solicitor who is "the person liable to pay" the *London* agents' bill of costs. A country solicitor can tax his *London* agents' bill of costs, and it is constantly done. The 17th section of the Act is retrospective, and we understand it is the common practice for the taxing officer to allow interest on disbursements made prior to the Act.

Ince, Q.C., and *Millar*, Q.C., for the Plaintiff, were not heard.

JAMES, L.J. :—

I am of opinion that the decision of the Master of the Rolls cannot be disturbed. *Primâ facie* it does seem very hard that

(1) 4 Giff. 683; 1 Jur. N.S. 684
(2) 3 E. & B. 307, 321, 328, 336; 4 E. & B. 1. 18 Jur. 1094.
(3) Law Rep. 18 Eq. 154.
(4) 23 W. R. 658.
(5) Law Rep. 15 Eq. 394.
(6) Amb. 584.
(7) 2 Ves. 36.

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this gentleman, Mr. *Eyre*, should have been kept out of his money for all these years, and that he should not have interest on it. However, we have not heard Mr. *Millar*, and there may be, as he has intimated, a very good answer to that comment of mine.

In the first place, I am of opinion that the claim in the answer of the Defendant *Lawson* that in taking the accounts, if they were to be taken, to which he objected, he was entitled to interest, is not a demand for money within the Act of Parliament. Again, the letter accompanying the account, which stated that it was the opinion of a Mr. *Warriner* that there should be a demand for interest, is not a demand, in my opinion, for interest within the Act of Parliament.

With regard to the third ground, which is that the case is within the *Attorneys and Solicitors Act*, 1870, which says that interest may be allowed on disbursements, it appears to me there are one or two answers to that. First of all, the statute seems to me to deal entirely with cases arising between solicitors and their clients, and not those between country solicitors and their *London* agents, which was the footing on which this decree was made, and this account was directed to be taken. I think the relation between these parties was not the common relation of a solicitor to an ordinary client, but the relation of a *London* agent and a country solicitor. More than that, it appears to me, unless it has been decided to the contrary, that we should be doing great injustice if we were to hold that this Act, passed in 1870, could have any retrospective effect on work and labour done before that year. Moreover, the matter has not been dealt with on taxation, and it is only upon taxation that the Act comes into operation, and no taxation was applied for apparently either on one side or the other in the suit, but it was dealt with as a mere ordinary money demand. Further, it is very difficult to see how this question of interest on disbursements could come to be raised when the account has never been taken, but the parties have agreed on a lump sum as due up to a particular date, the date of the decree. That seems to me to determine the question; and the only real question is, whether on that balance so admitted as due up to that date interest could be given as from that date. It seems to me it could not. Independently of that, I am of opinion that the claim

is precluded by the language of the decree, and, whatever may have been the reasons or motives of that decree, I cannot think it could have been done *per incuriam*, seeing the suit was a very hostile one by the Plaintiff against the Defendants, to whom he owed money, and the Defendants objected to the suit, and were made to pay the costs up to and including the hearing. In a hostile suit of that kind, the parties being at arms' length, the decree is to take an account of the receipts and payments on both sides, and of the dealings and transactions between them. In that suit there was raised, not effectually for the purpose of making a demand within the statute, but as a matter of litigation, the question whether the Defendants were, or were not, entitled to interest upon the amount alleged to be due to them. That was a matter at issue in the cause at the time of the hearing, and that matter at issue was not adjudicated upon, for there was nothing in the decree either allowing it or disallowing it. It was not put in a train of inquiry, nor was it reserved; and in the absence of any one of those three things, it appears to me to be quite contrary to the principle and practice of this Court to allow a claim for interest to be brought in as something corollary or incident to the decree. If there had been a mere decree for taking an account of receipts and profits, and then further consideration had been reserved, the Court might have done it according to those cases which have been cited to us, where trustees and executors have been charged with interest. But I am not aware of any persons, except persons in a fiduciary relation, who have been charged with interest in that way. Therefore, on that ground also I am of opinion that the order of the Master of the Rolls must be affirmed.

BAGGALLAY, L.J.:—

Agreeing, as I do, with the Lord Justice *James* and the Master of the Rolls, there is, in my opinion, an apparent hardship on the Defendant in this case in having been kept so long a time out of a sum of money which is admittedly due and owing to him. I say apparently, because we have not heard any explanation from the other side as to the circumstances under which this delay has occurred.

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Now, it does not appear to me necessary to express a confident opinion as to whether or not the claim is barred by the form of the decree or not, although I entertain a very strong opinion that, having regard to the form of the decree, this application cannot be maintained. As regards the decree, the first thing I observe is that there is a declaration that the account is to be taken as against the Defendants on the footing of their being agents for the Plaintiff, and then there are the two classes of account which have reference to what I may call the agency business and the railway business, and then one general sweeping account of all other matters and things. The application that is now made is that in taking these accounts interest may be allowed in respect of certain sums which are mentioned. It is admitted that in order to support this application it must be brought under the operation either of 3 & 4 Will. 4, c. 42, s. 28, or of 23 & 24 Vict. c. 28. In the first place, it is said that according to the Act of 3 & 4 Will. 4, there has been a demand in writing made, and that from the date of that demand it would be right and proper that interest should be allowed. Now, two periods have been fixed at which it was stated that such a demand ought to be treated as having been made; first, when the answer was put in in 1872, and, secondly, when a letter was written in November, 1875. It appears to me impossible to hold that a mere suggestion or statement that a certain amount is due in respect of principal and interest at a particular time can be regarded as a demand in writing to satisfy the provisions of the 28th section. Nor, again, can the writing of a letter in which it is said that somebody else is of opinion that a claim might be made for interest equivalent to a demand for interest. I think to so hold would be going far beyond what this Court has ever done with reference to the interpretation of the 28th section. Then, as regards the Act of 23 & 24 Vict. c. 28, the suggestion is that under the 17th section there is a power there given to allow interest upon disbursements and upon balances from time to time in hand. The Lord Justice has already pointed out that this Act was passed in 1870, and cannot be supposed to be treated as having any retrospective effect with regard to these various matters. But beyond that, it appears to me that this was not what would be considered an account between a solicitor and client,

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even giving to the word "client" the extended meaning which it has been contended the 3rd section of the Act does give it. It is not a case within the purview of the 17th section. For these reasons it appears to me that on neither ground can the claim for interest be supported, though I regret that the circumstances do not justify our allowing it.

BRAMWELL, L.J.:—

I am of the same opinion, and express the same regret.

Solicitors: *J. M. Allen*; *Taylor, Mason, & Taylor.*

In re METROPOLITAN BANK.

HEIRON'S CASE.

C. A. 1880 *May* 10.

Practice—Company—Voluntary Winding-up—Action against Director—Summons for Examination of Director after Interrogatories fully answered—Companies Act, 1862, *ss.* 115, 138.

A voluntary liquidator who applies to the Court under the 138th section of the *Companies Act*, 1862, for an order under the 115th section to examine a person in respect of the affairs of the company is not entitled as of right to the order, but must satisfy the Court that it will be just and beneficial for the purposes of the winding-up.

Where a voluntary liquidator has brought an action on behalf of the company against an officer of the company, and has exhibited interrogatories which have been fully answered by the Defendant, he will not be entitled to an order under the 115th section for the examination of the Defendant unless he satisfy the Court that, notwithstanding the interrogatories already exhibited, he has a strong case for a further examination.

THIS was an appeal from the decision of Vice-Chancellor *Bacon*.

In March, 1879, the *Metropolitan Bank* went into voluntary liquidation, a liquidator was appointed, and resolutions were passed under which the business and assets of the bank were transferred as a going concern to another company.

In June, 1879, the voluntary liquidator on behalf of the bank commenced an action for damages against a Mr. *Heiron*, a director of the bank, for having made false representations to the bank concerning the position and credit of a customer whereby the bank lost some £3000, and for balances claimed from him.

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The Defendant put in a statement of defence, and was afterwards served with and answered interrogatories; and a summons by the Plaintiff excepting to the answer and requiring a further and better answer was dismissed by the Judge.

On the 28th of February, 1880, the action was set down for trial.

On the 19th of April the liquidator took out a summons in the winding-up under sect. 115 of the *Companies Act*, 1862, requiring the Defendant to attend at Chambers for examination for the purpose of giving information concerning his dealings with the bank.

The Vice-Chancellor considered that the liquidator was entitled as of right to examine the Defendant, and ordered accordingly.

The Defendant appealed.

Sir *H. Jackson*, Q.C., and *Northmore Lawrence*, for the Appellant:—

This application by the liquidator is an abuse of the process of the Court. It was never intended to give to some of the parties in a partnership—for a company is a partnership—a statutory power of discovery which they would not otherwise be able to obtain. We submit that a summons under sect. 115 in a voluntary winding-up is not a matter of course, but that, reading sects. 115 and 138 together, the liquidator must satisfy the Court that it is just and beneficial for the purposes of the winding-up that the examination should be had. Here no reason was given except a statement at the Bar that the liquidator desired to examine this gentleman.

Massey v. *Allen* (1) will be relied on by the liquidator, but the circumstances of that case are altogether different from those in this action. There, it was a *bonâ fide* application for information about the affairs of the company. Here, all the information they require can be obtained at the trial of the action now pending, and the present summons is an unfair attempt to make out a case against us by a roving examination before the trial.

Hemming, Q.C., and *Whitehorne*, for the liquidator:—

We admit we wish to ascertain whether it is prudent for us to

(1) 9 Ch. D. 164.

go on with our action, and we submit that that is not an improper use of the section. If we had not first commenced our action we should have been entitled to the order as a matter of course. The settled practice is for the Court to proceed on an *ex parte* statement, not on oath, carried into Chambers by the liquidator, and the *onus* is on the party summoned to shew cause against the summons. The answers to the interrogatories may be sufficient, but may be very different from the information which we may be able to procure on this examination. The proceeding is analogous to the examination of a debtor under sect. 96 of the *Bankruptcy Act*, 1869. We can put what questions we like, and shall probably obtain information which will enable us to decide whether to proceed with our action or not. What difference can it make whether we take out the summons before or after bringing our action? One course is as legitimate as the other.

[JAMES, L.J.:—Has there ever been an action of this kind in which, after interrogatories have been exhibited and sufficiently answered, a summons under the 115th section has then been applied for and been granted?]

In *Massey* v. *Allen* (1) interrogatories had been served upon and answered by the Defendants *Allen* and *Hardwick* before the summons was taken out, although that fact does not appear in the report. In *Ex parte Carver* (2) and *Ex parte Bateman* (3) the summons was obtained after action brought. We submit that the principle of those cases entirely covers the present, and cases like these, regulating every-day practice, will not be lightly overruled. Further, this is an appeal from the exercise of the Judge's discretion under the 115th section. The Appellant, as a person summoned under that section to give information respecting the affairs of the bank, is in the position of a witness and has no *locus standi* to appeal: *In re Gold Company* (4).

JAMES, L.J.:—

I am of opinion that this order ought not to be sustained. As has been pointed out, the powers conferred on voluntary liquidators by virtue of the 115th and 138th sections of the *Companies*

(1) 9 Ch. D. 164.
(2) 47 L. J. (Ch.) 702, n.
(3) 15 W. R. 118, 245.
(4) 12 Ch. D. 77, 84.

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Act, 1862, are very inquisitorial, and the more inquisitorial they are, the more the Court is bound to take care that they are not used for the purpose of vexation and oppression. In my opinion the proposed examination here will be oppressive and vexatious. This liquidator before he commenced his action could have obtained under the Act of Parliament all the discovery he required. He did not choose to do so. He commenced his action, and called upon the Defendant to put in his statement of defence. He then called upon the Defendant to answer interrogatories, which he did, and then sought to enforce further answers, but the Judge held them to be sufficient. Having done all that, he now comes and seeks to take advantage of the inquisitorial powers conferred on him by the section. In my opinion that is vexatious. It is an axiom that *nemo debet bis vexari*, but here the liquidator having subjected this Defendant to searching interrogatories now asks to interrogate him again. In my opinion the liquidator must be content with what he has done: at any rate, he ought to make out a very strong case before the Court will, after what has taken place here, allow him to proceed under the 115th section.

BAGGALLAY, L.J.:—

I am of the same opinion, and I only desire to add this: The 138th section confers jurisdiction to grant the summons if the Court is satisfied that it will be just and beneficial. Here the learned Judge below thought the liquidator was entitled to an order as of right, and did not base his decision on the ground that it was just and beneficial for the purposes of the winding-up. It is therefore open to us to review his decision.

BRAMWELL, L.J.:—

I am of the same opinion. It is unjust to say that this summons is a matter of right, for, when the sections to which we have been referred are considered, the Court is to grant it if it appear to be just and beneficial. Now this liquidator was clearly entitled to come to the Court for this examination before he brought the action, and he was also entitled to apply to the Court after action brought; but the question now is, what are his rights after he has examined the Defendant on interrogatories which have been sufficiently answered? I am of opinion he ought to have made this

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application earlier. He has harassed and vexed this Defendant with one set of interrogatories, and now, upon a surmise that he may learn something more on another examination, he wants to do so again. I am of opinion that in order to obtain this order the liquidator ought to come to the Court with such materials as to shew that, plus the interrogatories already exhibited, he has a case which entitles him to have a further examination of the Defendant. Here no such case is made out. It is much better, therefore, that liquidators should understand that if they wish to exercise this inquisitorial power they ought to do so in the first instance, and not wait until after they have tried their hand at one attempt, which may not perhaps have turned out quite so successful as they anticipated.

Appeal accordingly allowed with costs.

Solicitors for Appellant: *Harper, Broad, & Battcock.*
Solicitors for Liquidator: *Newman, Stretton, & Hilliard.*

In re MORTON AND HALLETT.

C. A. 1880 M. R. *Feb.* 10. C. A. *May* 14.

[1879 M. 380.]

Trust for Sale—Sale by Heir of Surviving Trustee.

A testator devised his freehold and copyhold estates to trustees and their heirs "upon trust that they his said trustees or the trustees or trustee for the time being of that his will," should sell the estates. He empowered "his trustees, or the trustees or trustee for the time being of that his will," to give receipts, and declared that if the trustees thereby appointed, or either of them, or any trustee or trustees to be appointed as thereinafter provided should die, or desire to be discharged, then and so often the said trustees or trustee might appoint a new trustee or new trustees. The trustees having died, the customary heir of the survivor contracted to sell part of the copyholds.

Held, by the Court of Appeal, affirming the decision of *Jessel*, M.R., that the customary heir was competent to execute the trust for sale.

Whether *Cooke* v. *Crawford* (1) is to be treated as overruled, *quære*.

Osborne to Rowlett (2) doubted.

JOHN COLE, by will, dated the 28th of May, 1852, bequeathed to *H. N. Wixley* and *George Morton* his residuary per-

(1) 13 Sim. 91. (2) 13 Ch. D. 774.

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sonal estate upon trust to get in and convert the same into money, and invest the proceeds "in the names of my said trustees or the trustees or trustee for the time being of this my will," and pay the income to *Margaret May* for life, and after her death upon trust "that they my said trustees or the trustees or trustee for the time being of this my will," should stand possessed of the fund upon the trusts thereinafter declared. The testator then proceeded to devise to *Wixley* and *Morton*, and their heirs, all his freehold and copyhold estates, to hold the same unto the said *H. N. Wixley* and *G. Morton* and their heirs, "upon trust that they my said trustees or the trustees or trustee for the time being of this my will" should permit and suffer *Margaret May* to occupy and use or to receive and take the net rents and profits of the estates during her natural life, and from and immediately after her decease "upon trust that they my said trustees or the trustees or trustee for the time being of this my will" should make sale and absolutely dispose of the said freehold and copyhold hereditaments, and should stand possessed of the proceeds upon trust to pay and divide the same, and also the funds arising from his residuary personal estate, among the children of certain persons therein named. He empowered "my said trustees or the trustees or trustee for the time being of this my will" to give receipts for all moneys arising from the sale of his real estate. And he declared that if the said trustees thereby appointed, or either of them, or any trustee or trustees to be appointed as thereinafter was provided, should die, go to reside beyond seas, or be desirous of being discharged, or refuse or become incapable to act, then and so often "the said trustees or trustee (and for this purpose any retiring trustee shall be considered a trustee)" might appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, going to reside beyond seas, or desiring to be discharged, or refusing or becoming incapable to act, and he directed that upon every such appointment the said trust premises should be so conveyed and transferred that the same might become vested in the new trustees or trustee jointly with the surviving or continuing trustee or trustees, or solely as the case might require, and the testator appointed the above-named trustees his executors.

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The testator died in September, 1852, and his will was proved by the two executors. The surviving trustee died intestate in 1859. The tenant for life having died, the customary heir of the surviving trustee was admitted to the copyholds, and entered into a contract for the sale of a part of them. The question whether he could make a good title came before the Master of the Rolls on an adjourned summons under the *Vendor and Purchaser Act*, 1874, on the 10th of February, 1880.

F. W. Maitland (*Chitty*, Q.C., with him), for the purchaser, contended that the customary heir could not make a good title, and cited *Osborne to Rowlett* (1), *Titley* v. *Wolstenholme* (2), *Macdonald* v. *Walker* (3), and *Robson* v. *Flight* (4).

Davey, Q.C., and *W. W. Cooper*, for the vendor, were not called upon.

JESSEL, M.R.:—

I have no doubt that all has been said on behalf of the purchaser that could have been said, but still I am surprised the point has been raised. I have always thought that under a devise to *A.* and his heirs upon trust to sell, the heir of *A.* could sell; and I must say I never until this moment thought that any doubt upon the subject was entertained by any lawyer. If any doubt really existed it would be a serious matter, for the number of titles depending upon a sale by the heir of a devisee in trust is enormous. The difficulty in a sale under a devise in trust for sale has generally arisen in cases where the surviving trustee has not allowed the trust estate to descend, but has devised it to a trustee.

I have commented very recently, in *Osborne to Rowlett*, on the power of the devisee of the trust estate to sell, and I thought he could do so; but since *Cooke* v. *Crawford* (5) was decided, no one has taken a title from such a devisee, but it has always been taken from the heir of the surviving trustee; so that if I decide

(1) 13 Ch. D. 774.
(2) 7 Beav. 425.
(3) 14 Beav. 556.
(4) 4 D. J. & S. 608.
(5) 13 Sim. 91.

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this case as I am now asked to decide it, it would be a very serious matter indeed in the case of an immense number of titles.

Now what is the doubt suggested in this case? It is that in *Titley* v. *Wolstenholme* (1) and *Macdonald* v. *Walker* (2) the Judges have said that it is impossible to suppose that a testator placed a personal confidence in such an unknown and uncertain person as the heir of the survivor of his trustees; the Judges meaning probably a confidence as distinguished from ownership in the land. But the same thing might be said as to "executors and administrators": no one supposes that the testator means to repose a personal confidence in the executors or administrators of the surviving trustee. What he means is, that it may be necessary for the trust to continue beyond the life of the surviving trustee, and that therefore it shall be in the hands of the person who takes the property under the devise: the testator cannot continue the trust in any other way.

In *Osborne to Rowlett* (3) I extended what those Judges have said a little by saying that the devisee of the surviving trustee could sell the whole estate, but keeping in view the principle that the trust must accompany the whole ownership.

Then it is said that the words of the devise in this will are uncommon. The heir in this case is the customary heir; as a rule the customary heir is not the common law heir. Now what are the words of this devise? The testator devises "to *H. N. Wixley* and *G. Morton*, and their heirs, all my freehold and copyhold estates, to hold the same unto the said *H. N. Wixley* and *G. Morton*, and their heirs," upon trust for his wife for life, and after her death "upon trust that they my said trustees, or the trustees or trustee for the time being of this my will," shall sell. That is all: there are no other words to control the clause.

Now, who are meant by "my said trustees or the trustees or trustee for the time being of this my will?" They must be the two persons named and the heir of the survivor, for they are the persons who are to take the property "upon trust," that is to say, the persons or person for the time being having the legal estate. The words are the commonest of common words. The testator intended that the property should be sold after his wife's death:

(1) 7 Beav. 425. (2) 14 Beav. 556. (3) 13 Ch. D. 774.

he knows that the two named trustees may die in his wife's lifetime, and he intends that in that case the heir of the survivor shall sell: otherwise no one can sell after the wife's death. When we come to look at the power of appointing new trustees we find a singular confirmation of that view; not that the clause was actually intended to throw light upon the prior devise, because we all know how these clauses are thrown into a will; but this being a Court of construction, we are bound to look at all the words the testator has in fact used, in order to ascertain his intention. [His Lordship then read the power of appointing new trustees, and continued:—] Now who are the "trustees or trustee" who are to appoint, if both the named trustees die? Some one: and I cannot find any one except the heir of the survivor, or the person or persons having the personal estate. Then there is a direction for the transfer of the trust estate to the new trustees. It appears to me that the testator has contemplated the possibility of both the named trustees dying, and of some one calling himself a trustee appointing new ones. If that were wanted, that shews that in using the words "trustees or trustee" in his will, the testator must have intended to include the heir of the survivor of the named trustees; but I should have come to the same conclusion without that clause.

I therefore dismiss the summons, with costs.

C. A.

From this decision the purchaser appealed. The appeal was heard on the 14th of May.

Chitty, Q.C., and *F. W. Maitland*, for the Appellant:—

Here is a devise to trustees in trust that they or the trustees or trustee for the time being shall sell. The heirs are not mentioned, and are not persons in whom the testator has reposed any confidence. We say that the heir is not a trustee for the time being, but a mere depositary of the legal estate. *Osborne to Rowlett* (1) lays down the principle that no trust was intended to be reposed in the heir.

[JAMES, L.J.:—That case appears rather to be against you; it went on the principle that the trust accompanied the estate.]

(1) 13 Ch. D. 774, 782.

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The power of appointing new trustees is in a peculiar form and has come to an end. The Master of the Rolls treated it as confirming his view, but we submit that it is in our favour. Who are the parties to exercise it when both trustees have died and there are no persons who can say of themselves that they are the trustees or trustee of the will, the three descriptions of property having gone in three different ways—the freeholds to the heir-at-law, the copyholds to the customary heir, and the personal estate to the executors? *Cooke* v. *Crawford* (1), which was in favour of the heir, is disapproved and overruled in *Osborne to Rowlett* (2). *Titley* v. *Wolstenholme* (3) is against the idea that an heir is a duly constituted trustee. *Mortimer* v. *Ireland* (4) and *Ockleston* v. *Heap* (5) strongly support the same view, for in each case the *cestuis que trust* were held entitled to have new trustees appointed.

[JAMES, L.J.:—It was not decided in either of those cases that the representative could not execute the trust.]

If he was a duly constituted trustee the Court could not displace him and appoint another. In *Macdonald* v. *Walker* (6) Lord *Romilly* held a title depending on the devisee of the surviving trustee being entitled to sell too doubtful to be forced on a purchaser. That proceeds on the principle that a person cannot execute the trust because the legal estate is in him if he is not a person pointed out by the testator as intended to execute it. *Wilson* v. *Bennett* (7), *In re Burtt's Estate* (8), *Ashton* v. *Wood* (9), and *Stevens* v. *Austen* (10), are to the same effect. In *Hall* v. *May* (11), where the word "assigns" occurred, it was held that the devisee could sell, no personal confidence being reposed in the heir. The cases are summed up in *Sugden's* Vendors and Purchasers (12). *Robson* v. *Flight* (13) affirms the principle that a person not pointed out by the testator to execute a trust cannot execute it merely because the estate is in him. The testator

(1) 13 Sim. 91.
(2) 13 Ch. D. 774.
(3) 7 Beav. 425.
(4) 6 Hare, 196; S. C. on appeal, 11 Jur. 721.
(5) 1 De G. & Sm. 640.
(6) 14 Beav. 556.
(7) 5 De G. & Sm. 475.
(8) 1 Drew. 319.
(9) 3 Sm. & Giff. 436.
(10) 3 E. & E. 685.
(11) 3 K. & J. 585, 589.
(12) 14th Ed. p. 685.
(13) 4 D. J. & S. 608.

contemplated one set of trustees to execute the trusts as regarded personal estate, freehold, and copyholds. He never thought of three sets acting at the same time as to the three kinds of property.

Davey, Q.C., and *W. W. Cooper*, *contrà*, were not called upon.

JAMES, L.J.:—

I am of opinion that the appeal must be dismissed. I agree with the Master of the Rolls that if an estate is given to *A.* and *B.* and their heirs on trust to sell, the heir of the survivor of *A.* and *B.* is a trustee under the will, takes the estate on trust for sale, and can sell it. Whether the Court, at the instance of the *cestuis que trust*, would appoint another trustee in his place, on the ground that he is not a person in whom the testator reposed personal confidence, is an entirely different question, which we need not now consider. In my judgment the Master of the Rolls is right in saying that until the estate has been taken from him the heir of the surviving trustee is a trustee; if he were not, a suit in Chancery would be requisite to effect a sale. Independently of the clause relating to the appointment of new trustees, it is reasonably clear that the heir-at-law takes the estate on trusts, and takes it as trustee. A question has been raised whether the language of that clause is enough to control the effect of what goes before. I am inclined to the view that the language of the power is favourable to the Appellants, but we need not go into that, for it would be very dangerous to modify the effect of a clear trust by reference to equivocal expressions in a power of appointing new trustees.

BAGGALLAY, L.J.:—

I am of the same opinion, and have only to add that if it had been necessary to give any opinion on the point arising in *Osborne to Rowlett* (1), I should have taken time to consider whether that decision ought to be followed. As at present advised, I am not prepared to dissent from *Cooke* v. *Crawford* (2).

(1) 13 Ch. D. 774. (2) 13 Sim. 91.

C. A. 1880 *In re* MORTON AND HALLETT.

BRAMWELL, L.J., concurred.

JAMES, L.J. :—I also wish to add that I am not prepared to say that *Cooke* v. *Crawford* (1) is to be considered as overruled.

Solicitors: *Tamplin, Tayler, & Joseph ; Marsden & Son.*

Dictum of THESIGER, L.J., at p. 161, *applied.* KING *v.* SMITH. [1950] All E.R. 553.

C. A. 1879 FRY, J. *Dec.* 16. C. A. 1880 *Jan.* 28; *June* 1, 4.

ATTORNEY-GENERAL *v.* TOMLINE.

[1874 A. 124.]

Copyholds—Encroachment on Waste by Copyhold Tenant—Minerals—Mining without Consent of Copyholder—Measure of Damages.

A copyhold was surrendered in 1809 to a trustee for the Crown for military purposes. In 1808 the then lord of the manor had granted to *M.*, the governor of a neighbouring fort, a license to inclose a portion of the waste adjoining the copyhold, and occupy it at a yearly rent during his life, if he so long continued governor, which he ceased to be in 1811. Nothing further was shewn as to the title to the land included in the license except that at the commencement of this action in 1874 the Crown had been in possession of it as inclosed ground, as well as of the original copyhold, for more than forty years. Since 1811 there had been repeated admittances of trustees for the Crown to the original copyhold, in which it was described by metes and bounds not including the close *L.* comprised in the license. In 1874 the lord of the manor, without the consent of the Crown, granted a license to get coprolites out of close *L.* at a royalty, and received £222 for royalties. The Crown brought an action for an injunction and damages. *Fry*, J., held that close *L.* had become an accretion to the copyhold tenement, and was of copyhold tenure, but the decree only granted an injunction and an inquiry as to damages, without any declaration of the rights of the parties. The Chief Clerk having certified that the damages payable to the Crown were £222, and *Fry*, J., having approved of his finding, the lord appealed on the ground that the damages were excessive. The tenant who held close *L.* under the Crown had separately received full compensation for surface damage, and the land had been restored to its original condition :—

Held, by the Court of Appeal, that, assuming the doctrine that encroachments made by a lessee enure to the benefit of the landlord to be applicable to encroachments by a copyholder, the application of that doctrine was excluded by the facts that the inclosure of close *L.* having been made by license from the lord was not an encroachment, and that the subsequent admittances did not treat close *L.* as part of the copyhold tenement.

Whether that doctrine does apply to copyholds, *quære.*

Held, that the Crown had under the *Statute of Limitations* acquired a

(1) 13 Sim. 91.

freehold title to close *L.*, and that as the coprolites, therefore, belonged to the Crown, the damages were not excessive.

Whether, if close *L.* had been copyhold, a finding which gave to the copyholder by way of damages the whole sum received by the lord for the coprolites could have been sustained, *quære.*

THIS case is reported at the hearing (1). The decree granted an injunction without any declaration as to the rights of the parties, and embodied an undertaking by Colonel *Tomline* to pay to the Crown half the gross proceeds of the sale of the coprolites gotten. It turned out that this undertaking had been given under a misapprehension of fact, and could not be carried out, and by a subsequent order, dated the 20th of March, 1879, an inquiry was directed what damages had been sustained by the informant and Plaintiffs by reason of the trespass of the Defendant upon the *Q Tower* land and the removal of coprolites therefrom, having regard to the decree.

In prosecuting this inquiry it appeared from the affidavit of the Defendant that he had let the coprolites to *Packard & Co.* at a royalty of 12*s.* per ton on the coprolites gotten and had received for royalties £222. The informant and Plaintiffs considering that according to the principles laid down in the judgment of Mr. Justice *Fry*, they were entitled to this sum at least, and wishing to avoid the necessity of further inquiry, applied to the Chief Clerk to certify that the damages were £222, which he accordingly did. The Defendant applied to vary this certificate on the ground that the damages were excessive.

The application was heard on the 16th of December, 1879.

Phear, for the application.

Rigby, contrà, was not called upon.

FRY, J.:—

The Chief Clerk in this case has found the damage payable by Colonel *Tomline* to the Crown to be the full amount of the royalty paid by Messrs. *Packard* to Colonel *Tomline* in respect of the coprolites in controversy. It appears to me that the Chief Clerk is quite right in that finding.

(1) 5 Ch. D. 750.

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In the first place, the point appears to me to be covered by my decision in May, 1877, from which judgment there has been no appeal.

In the second place, that judgment upon reconsideration appears to me to be right. Messrs. *Packard* worked the coprolites at Colonel *Tomline's* instance. They are, therefore, so to speak, acting under him as his agents. It has been contended that there are two persons whose consent is necessary to be obtained in order to enable any person to work the coprolites—first, the lord of the manor, in whom the coprolites are vested, and, secondly, the copyholder, who is entitled to prevent access to them, and that, there being two persons whose consent must be obtained, the royalty which represents the price of the consent must be divided between them. That would be so in the case of a stranger. But that is not the present case. Colonel *Tomline* himself is the working person, and he cannot insist that his consent shall be paid for. The person who does a thing has not to buy his own consent to the thing being done, and therefore that argument appears to me fallacious.

Again, it is in my judgment justly observed that Colonel *Tomline* cannot in this case insist upon a division of the royalty between himself and the Crown, because he himself is the wrong-doer, and therefore cannot claim any portion of that money which represents the consent of the Crown which had to be purchased before he could lawfully work. I therefore dismiss the summons with costs.

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The Defendant appealed, and the appeal was placed in the list of appeals from orders made on interlocutory motions, and came on to be heard on the 28th of January, 1880.

Phear, for the Appellant:—

[JESSEL, M.R.:—This is a final order in an action of trespass, and ought not to be in the list of interlocutory appeals. However, as a matter of indulgence, you may go on.]

The question is as to the principle on which the damages ought to be assessed. Mr. Justice *Fry* laid down the rule thus (1):

(1) 5 Ch. D. 768.

"Everything which arises from the sale of the coprolites, and which is not necessary to repay the outlay for the working and to induce a third person to undertake the working, would naturally come to the person who can prevent the coprolites from being dug. He has an absolute veto. The value of that veto appears to me to be the value of the coprolites less so much money as would induce a third person to get them, that is, the measure of damages would be the net returns from the sale of the coprolites less such a sum of money by way of profit as would induce a third person to undertake the enterprise."

[JESSEL, M R.:—That gives the whole interest of the lord to the copyholder who has the veto. I do not understand it. There is, no doubt, great difficulty in saying on what principle vindictive damages, which these are, ought to be assessed. They are vindictive damages because they are not measured by the injury actually done. I have had cases before me where the owners of mines have carried coal through an intervening disused mine. No damage was done, but I have given the owner of the disused mine a way-leave rent. A Judge directs a jury to give the actual damage done plus such a reasonable sum as they think fit to give by reason of the way in which the trespass has been committed.]

The tenant having been compensated, the only damage sustained by the Plaintiffs is, that they have lost the right of preventing the Defendant from getting the coprolites, and to give them the whole of what he has received is excessive. To give them half would be ample, but we have offered £150, and by that offer we abide.

[He was here stopped by the Court.]

Rigby, for the informant and Plaintiffs:—

Where a man by wilful trespass breaks into a close, the owner may recover damages without shewing in pounds, shillings, and pence what he has lost.

[JESSEL, M.R.:—No doubt he is entitled to something for the annoyance, but here the tenant has been paid for the annoyance and the surface has been restored.]

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Both tenant and reversioner are entitled to vindictive damages for this wilful trespass.

[JESSEL, M.R.:—I agree to that. The question is, what is the measure of the damages? In many places miners work with the consent of the copyholders, but I never heard of the copyholders receiving so much as half the proceeds for their consent.]

The trespass being wilful, Colonel *Tomline* ought not to be allowed to make a profit by the transaction.

[JESSEL, M.R.:—I am not aware of there being any such principle. Suppose Colonel *Tomline's* ox had strayed into your field, and he trespassed to get it out, do you say you could recover the value of the ox?]

If I had a right to detain the ox, as here to detain the coprolites, I submit that the principle would apply.

[COTTON, L.J.:—There are no circumstances entitling you to special damages: the lord of the manor has taken away coprolites which belonged to him, and the surface damage has been paid for.]

They did not in fact belong to him, for under 5 & 6 Vict. c. 94, and 18 & 19 Vict. c. 117, a copyhold acquired by the Crown for military purposes is vested in the Secretary of State as a freehold.

[JESSEL, M.R.:—The Court below decided that the coprolites belonged to the Defendant and you did not appeal.]

We could not appeal, for the decree does not declare any rights, and we could not appeal from a mere expression of opinion by the Judge. The whole case is open. Apart from the Act, we say we have a freehold title. This land cannot be copyhold unless there is a custom in this manor to grant copyholds out of the waste, and such a custom has not been proved; and we do not admit that the doctrine of encroachment by a tenant enuring to the benefit of the landlord applies to copyholds.

[JESSEL, M.R.:—The whole case may turn on the question whether there is such a custom; and, assuming that there is, the point which has now been decided for the first time is one of

great difficulty, whether the doctrine as to encroachment by a leaseholder applies to an encroachment by a copyholder.

Phear:—I have not come prepared to argue this point on the present occasion. We supposed that the informant and Plaintiffs acquiesced in the decision that the land was copyhold.]

JESSEL, M.R.:—

This case involves several very important questions. It has to be decided whether the law as to encroachment by a leaseholder applies to encroachment by a copyholder. It can only apply where there is a custom to make new copyholds, and it must be seen whether there is such a custom in this case. There is the further question, whether the circumstances are not such as to rebut the presumption that the encroachment was made in respect of the copyhold. There is also the question whether under the Acts of Parliament which have been referred to the copyhold has not been turned into a freehold. The appeal must go into the general list.

The appeal accordingly took its place in the general list.

It appears from the former report that the land upon which the trespass complained of by the information had been committed was land as to which, at a Court holden on the 3rd of November, 1808, the then lord of the manor had granted to *Alexander Mair*, the then Governor of *Landguard Fort*, a license to inclose it from the waste, and to hold it to him, *A. Mair*, for his life, if he should so long continue Lieutenant-Governor of *Landguard Fort*, he paying annually during the continuance of the license the sum of 2*s.* 6*d.* *Mair* ceased to be Lieutenant-Governor of the fort in 1811. There was no evidence whether *Mair* actually inclosed this land or not, nor how it came into the possession of the Crown, but there was evidence of the Crown having been in possession of it as inclosed land for forty years and upwards. The adjoining copyhold which had been surrendered to a trustee for the Crown, was from time to time after 1811 transferred by fresh surrenders and admittances to trustees for the

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Crown by the old description, by metes and bounds, not including the land comprised in *Mair's* license.

The appeal came on for further hearing on the 1st of June, 1880.

Cookson, Q.C., and *Hadley*, for the Appellant:—

We submit that the principle that encroachments by a lessee enure for the benefit of the landlord applies as between a copyholder and the lord of the manor. The principle of the rule appears from *Bryan* v. *Winwood* (1) and *Andrews* v. *Hailes* (2).

[COTTON, L.J.:—Is there any case where, if a lessee has encroached and then taken a new lease not including the encroachment, the landlord has been held entitled to the encroachment?]

We cannot find any such case. The nearest approach to it is where a lessee under a renewable lease has taken a renewed lease by the old description, and the estoppel would not be excluded by that. *Doe* v. *Tidbury* (3) and *Kingsmill* v. *Millard* (4) support our case. The *Statute of Limitations* does not apply: *Whitmore* v. *Humphries* (5).

[JAMES, L.J.:—How do you make out that there was an encroachment at all in this case?]

Either there was an inclosure of this land with a view to add it to the copyhold, or the Crown must have taken possession wrongfully, and according to *Doe* v. *Tidbury* the Court will presume a legal origin of the encroachment.

Hemming, Q.C., and *Rigby, contrà*, were not called upon.

JAMES, L.J.:—

It seems to me quite clear that all the learning as to encroachment is entirely excluded by two facts which distinguish this case from all the cases on that subject.

First of all it is proved by one of the Defendant's own witnesses that the piece of ground in question was not originally acquired by

(1) 1 Taunt. 208.
(2) 2 E. & B. 349.
(3) 14 C. B. 304.
(4) 11 Ex. 313.
(5) Law Rep. 7 C. P. 1.

any wrongful act as against the lord of the manor for the time being. A license was given by the lord of the manor in 1808 to Colonel *Mair*, who was then the Governor of *Landguard Fort*, to inclose this land and hold it during his occupancy of that office. *Mair* therefore was not a trespasser as between him and the lord, nor was he a trespasser as against anybody, for a man who encroaches on a common does not trespass as against the commoners. The commoners might have called the proceedings in question by bringing an action for disturbance of common, or by the more usual course of taking down the fences which prevented their enjoying their right of common. It was a lawful inclosure as against the lord, and therefore there was never anything that could be called an encroachment in its origin, because I infer as a matter of fact that *Mair* inclosed and occupied this land in pursuance of the license. Now, the effect of that license was not to convey to *Mair* a copyhold interest, but to give him a common law holding. I apprehend that the license would not be sufficient to create an estate for life, but would make the licensee a tenant at will, or, if a yearly rent was paid, a tenant from year to year. The lord would then be freeholder entitled in reversion expectant upon that tenancy. There is no reason to presume, and I do not presume, that when that gentleman in 1811 ceased to hold his office the fences were thrown down and the piece of land remitted to its original position of *de facto* as well as *de jure* waste, so as to restore the commoners to the possession of their rights over it. There is no ground for the presumption that there ever was a restoration of this inclosed land to the character of uninclosed common, and that after the expiration of that license somebody on behalf of the Crown, or otherwise, made a fresh inclosure of it by way of encroachment. There never, therefore, was any encroachment, and the cases on the subject of encroachment do not apply. In the second place, the doctrine of the cases is, as it seems to me, entirely excluded by the fact that, after the supposed accretion or addition to the original piece of copyhold land, the then copyholder surrendered to the lord, not the original piece of copyhold land along with this additional piece of land, but the original copyhold only, and the lord regranted specifically that copyhold piece to a new copyhold tenant. When that new grant had been made, it is

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quite clear that the copyholder could not have said to the lord, I am holding this additional piece of land as your copyhold tenant. If, after the surrender and admittance had been made, the lord had been minded to bring an action of ejectment to recover this as a piece of land the tenancy of which had ceased when the governor left his office, the copyholder could not have said to the lord, "This is a piece of ground which I inclosed for your benefit; it was thrown into the copyhold, and you have regranted it to me." Therefore it appears to me that after that surrender and admittance, the theory that this piece of land is an accretion to the original copyhold tenement is entirely excluded.

That being so, we have simply the case of a piece of land which was inclosed by the lord through his licensee, and which, after twenty years from the inclosure, became the lord's free from commonable rights. From the time of the determination of *Mair's* tenancy there was a wrongful possession of it, and there is nothing whatever to exclude the operation of the *Statute of Limitations.* There appears to me to be no ground whatever for saying that the Crown has not a freehold acquired by adverse possession. Whether such a title would have been acquired before the statute 3 & 4 Will. 4, c. 27, it is not necessary to inquire, but whether there was adverse possession in the old sense of the words or not, there has been such a cesser of the possession of the rightful owner as to confer a title under that statute.

That being so, the principal Secretary of State and the Duke of *Connaught* are in possession as freeholders, and the coprolites, in that view of the case, being their property, there is no ground for saying that the damages given are excessive.

COTTON, L.J.:—

This question comes before us in a somewhat peculiar way. It is an appeal against the *quantum* of damages assessed for digging coprolites under the land in question. The Defendant complains that the amount of damages is too large, and he appeals on the footing that the land was copyhold of the manor of which he is lord, and that he was therefore owner of the coprolites, though he had no right to get them without the consent of the copyholder. The Plaintiffs reply that the land is their freehold,

and if they can establish that I am of opinion that the Defendant has not been made to pay more in the way of damages than he ought to pay.

The Defendant first alleges that the question whether the land is freehold or copyhold is not open, because the original decree proceeded upon the footing of its being copyhold; and no doubt Mr. Justice *Fry*, in his judgment, dealt with the matter on that footing. But there is no declaration in the decree that the Plaintiffs were copyholders of this piece of land, nor is there anything in the decree which makes that question a *res judicata*. The question, therefore, is open on this appeal.

Let us, then, look at the facts. The Defendant no doubt is lord of the manor, and this piece of land was originally part of the waste of the manor. It appears that a license was granted in 1808 to Lieutenant-Colonel *Mair*, then the Governor of *Landguard Fort*, to inclose this piece of land, and occupy during his tenure of that office, which expired in 1811. There is no further evidence as to the title to it, except this, that the Plaintiffs, or some of them, and those through whom they claim title, have been in possession of the land for more than forty years, and there is nothing whatever to shew that they have ever been dealt with as being copyhold tenants of it. There have been from time to time since 1811 admittances of those through whom the Plaintiffs claim to the adjoining piece of land, of which there was originally a copyhold grant, but without any words which could include the particular piece of land in question. The subsequent admittances then are inconsistent with the notion that the Plaintiffs and those through whom they claim were copyhold tenants of the piece of land on which the digging has taken place. As that is so, the title of the Plaintiffs simply rests on possession, and *primâ facie* a title by possession is a freehold and not a copyhold title.

The Appellant relies upon cases in which it was held that if a leaseholder encroaches upon adjoining land, and takes in small pieces of land convenient to be held with and used for the same purposes as his original holding, then those pieces of land are considered as an accretion to his original leasehold tenement. But that question has only arisen on the determination of the lease where the landlord has sought to recover the piece so gained

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by encroachment; and it has been held that, under those circumstances, the tenant is not at liberty to dispute his landlord's title, and that the landlord is entitled to recover in ejectment. I do not give an opinion as to whether or no that principle could in any case apply to an encroachment or an accretion made or acquired by a copyhold tenant, but it is remarkable that the case has never arisen except under the circumstances which I have mentioned. In *Whitmore* v. *Humphries* (1), Mr. Justice *Willes* says: "By the rule of law applicable to this subject the landlord is entitled at the determination of the tenancy to recover from the tenant not only the land originally demised, but also any land which the tenant may have added to it by encroachment from the waste, such encroachment being deemed to be made by him as tenant as an addition to his holding, and consequently for the benefit of his landlord, unless it is made under circumstances which shew an intention to hold it for his own benefit alone, and not as part of his holding under the landlord." Assuming that this rule might apply in the case of a copyhold tenant as well as in the case of a leasehold tenant, it is liable to be rebutted not only by the circumstances under which the encroachment or accretion was acquired, but by any dealings between the landlord and tenant in determining their rights. If we find that there are subsequent grants by the lord to the copyhold tenant, or by the landlord to his leasehold tenant, of the original tenement by a description which clearly does not include the encroachment, then in my opinion the presumption that it was made as an accretion to the original holding cannot apply. In the present case we find that there have been, subsequently to the taking of possession of this piece, admittances to the original copyhold by a description excluding this piece of land. In my opinion, therefore, the presumption does not arise, and it must be held that the title of the Plaintiffs to this piece of land is what under ordinary circumstances it would be, viz., a freehold title, and that it is not an accretion to their copyhold. I do not say that under any circumstances an encroachment could become copyhold, or to be held by copyhold title, because, looking at the circumstances under which these questions as to accretions as between landlord and

(1) Law Rep. 7 C. P. 1, 4.

tenant have arisen, it may well be that they rest upon the principle that the lessee, being in a fiduciary position, is not at liberty to dispute his landlord's title to encroachments, the absolute title of the tenant to which might materially depreciate the value of the original premises when given up to the landlord, a principle which could hardly apply to encroachments by a copyholder.

THESIGER, L.J.:—

I am of the same opinion.

It appears from the cases cited by Mr. *Cookson* that there is a difference of opinion among Judges as to the exact grounds of the doctrine that encroachments made by tenants enure for the benefit of their landlords. This much at least is clear, and all Judges are agreed, that the doctrine involves a presumption of fact which is capable of being rebutted. Now here it appears to me that the facts necessary to support the presumption do not exist, and for two reasons. In the first place, I think that the true inference in this case is that the possession of the land in question never arose from encroachment at all. It appears that there was a license given to a former Governor of the fort of the name of *Mair*, and although there is no actual evidence that *Mair* ever entered into possession under that license, I think the true presumption from the facts which are proved, from the possession, which at all events is found to have existed not many years after that license to *Mair*, is that *Mair* did enter, and that there was no remitter after *Mair* ceased to be Lieutenant-Governor, that is to say the land did not return to its former uninclosed position as a portion of the waste, but that, in point of fact, upon *Mair* ceasing to hold the office in respect of which this land was given to him, the Lieutenant-Governor, if there was one, succeeding him, or the Secretary of State if no Lieutenant-Governor succeeded, took possession, not under any new encroachment, but as successor to the possession which was held by *Mair*. But even assuming that not to be so, it seems to me clear that inasmuch as the principle that encroachments by tenants enuring for the benefit of their landlords is founded upon a presumption of fact, a landlord and tenant may so conduct themselves in the course of transactions either by deed or otherwise as to shew that the landlord treated

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the encroachment as not enuring to his benefit. Now, is not that the position of things here? It appears that since the encroachment (because upon this branch of the case I will assume it was an encroachment) there have been surrenders of the land which was the subject of the original copyhold grant, and admittances in pursuance of such surrenders. Now, we find that the new surrenders and admittances included only the land which was the subject of the old surrender, so that the person who is assumed to have the right to take the benefit of the encroachment did not take the benefit of it, but treated it as not enuring for his benefit. Under those circumstances, it appears to me that the presumption of the encroachment enuring for his benefit could not arise. The land, therefore, on which the trespass was committed was, by virtue of the *Statute of Limitations*, the freehold property of the Crown, and in that view of the case it cannot be contended that the damages are excessive.

Solicitor for Crown: *W. Tindal Perkins.*
Solicitor for Defendant: *W. F. Stokes.*

C. A. 1880 *June* 9.

MOLLOY *v.* KILBY.

[1879 M. 144.]

Practice—Leave to exhibit Interrogatories for Examination of Opposite Party—Rules of Court, 1875, *Order* XXXI. *r.* 1.

M. commenced an action against *K.* *K.* delivered a defence and counter-claim, to which *M.* and *I.* were defendants. *I.* applied for leave to exhibit interrogatories for the examination of *M.*:—

Held, by *Hall*, V.C., and by the Court of Appeal, that as *I.* was not a defendant in the original action, and *I.* and *M.* were co-defendants in the counter-claim, they were not opposite parties, and that *I.* had no right to interrogate *M.*

THIS action was commenced in April, 1879, by *Molloy* and wife against *John Kilby*, to whom a farm had been demised for a term of forty years from Michaelmas, 1863, and the relief asked was to have the lease set aside or rectified by limiting it to three undivided fourths of the estate, and to recover possession of the remaining one-fourth, and to have an account of mesne profits, and a receiver.

The Defendant delivered a defence and counter-claim. By the defence he insisted on the validity of the lease. By his counter-claim, to which the Plaintiffs and *Edward Izzard* and wife were Defendants, he stated that Mrs. *Izzard* claimed to be owner in fee of the entirety of the premises subject to the lease, and that she and her husband had in June, 1879, distrained on the farm for a year's rent, and that the Defendant had been compelled to replevy and give a replevin bond under 19 & 20 Vict. c. 108, s. 65. The Defendant claimed to have it decided whether the Plaintiffs or *Izzard* and wife, or any of them, were the owners of the land for such estate as would enable them to give a discharge for the rent—damages—a receiver if necessary—and an injunction restraining proceedings for rent during the pendency of the action.

Izzard and wife appeared to the counter-claim and delivered a reply. They then applied by summons for leave to deliver interrogatories for the examination of *Molloy* and wife. Vice-Chancellor *Hall* decided that such leave could not be given, on the ground that Order XXXI., rule 1, only enabled parties to interrogate opposite parties, and that as *Molloy* and wife and *Izzard* and wife were co-Defendants to the counter-claim they were not opposite parties. *Izzard* and wife appealed.

Seward Brice, for the Appellants:—

It is submitted that under the *Judicature Act*, 1873, s. 24, we are entitled to examine the Plaintiff. By sub-sect. 3 judgment can be given binding us, and it is only reasonable that we should have the right to examine; if not, we have no means of effectually defending ourselves.

[JESSEL, M.R.:—You might get yourself made a defendant to the original action under Order XVI., rule 13, and then you could interrogate.]

Order XXXI., rule 1, if fairly construed, supports our contention, "opposite" being understood to mean "having an opposite interest." *MacAllister* v. *Bishop of Rochester* (1) furnishes an analogy in our favour under Order XXXI., rule 12.

(1) 5 C. P. D. 194.

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[JESSEL, M.R.:—In that case the rule says "any party," not "the opposite party."]

These parties are brought into the action, and must be considered as opposed to the Plaintiff.

Method, contrà, was not called upon.

JESSEL, M.R.:—

I am of opinion that the decision of the Vice-Chancellor is clearly right. This is an application by Defendants to a counter-claim, who are not Defendants in the original action, to interrogate the Plaintiff in the original action. There is no issue between them and the Plaintiff in the original action, and I am at a loss to imagine any interpretation of the expression "opposite party" in Order XXXI., rule 1, which will make *Izzard* and wife and the Plaintiffs opposite parties. They are, so to say, side by side parties. Mr. *Brice* contends that there will be a hardship if his clients cannot interrogate; but I do not see any, for there are provisions in the rules which prevent it. These parties can apply to the Court under Order XVI., rule 13, to make them parties to the original action, and when that is done they can interrogate the Plaintiff.

COTTON, L.J.:—

The only question is whether the Vice-Chancellor was right in refusing to allow a defendant to interrogate a co-defendant. Except as regards the mode of trial, a counter-claim is a separate action. It is said that the party against whom the application is made is a plaintiff, but he is not plaintiff in the action in which the application is made, but in another action. "Opposite party or parties" does not mean a party or parties having an adverse interest, but a party or parties between whom and the applicant an issue is joined. The 24th section does not assist the Appellants, for it applies only to a decision between the plaintiff and parties who have been brought in. They and the plaintiff are opposite parties between whom there is a litigation.

THESIGER, L.J.:—

I am of the same opinion, and will only add that the case of

MacAllister v. *Bishop of Rochester* (1) does not assist the Appellants. The parties there had obtained a rule making them parties, and there was a litigation between them and the plaintiff.

C. A. 1880 MOLLOY v. KILBY.

Solicitors: *Boxall & Boxall; W. L. O'Neill.*

TAYLOR *v.* GRANGE.

C. A. 1880 June 14.

[1878 T. 50.]

Partition—Equitable Estate—Overriding Trusts—Further Evidence.

Under a will two persons were equally entitled to real property for life with remainder to their children and issue, who were not yet ascertained. The trustees of the will had, during the lives of the tenants for life, powers of working a quarry on the estate, and making roads over the property for the purpose, and were directed to work the quarry and divide the profits among the persons entitled:—

Held (affirming the decision of *Fry*, J.), that, while the overriding power and trust existed, the Court had no jurisdiction to make a decree for partition or sale under the Partition Acts.

Where at the trial of an action the witnesses have been examined *vivâ voce*, further evidence by affidavit of the same witnesses will not in general be admitted on an appeal.

THIS was an appeal from the decision of Mr. Justice *Fry* (2).

The action was brought for the partition of the estates of *J. Turner*, which by his will he devised in trust for the Plaintiff, Mrs. *Taylor*, and her sister, Mrs. *Grange*, in equal shares, during their respective lives, with remainder to their children and issue, who were not yet ascertained. The testator gave powers to his trustees during the life of the tenants for life to work a quarry under the estate and make roads. The facts are fully stated in the previous report,

Mr. Justice *Fry* held that while the powers of the trustees remained the Court had no jurisdiction to make a decree for partition.

The Plaintiff appealed from this decision.

Cookson, Q.C., and *Whitehorne*, for the Appellants, asked for leave to read an affidavit of the receiver appointed in the action, filed

(1) 5 C. P. D. 194. (2) 13 Ch. D. 223.

C. A. 1880 TAYLOR v. GRANGE.

since the trial in the Court below, and giving further particulars of the nature and condition of the property.

Fischer, Q.C., and *F. H. Colt*, for the Respondents, objected to the affidavit being read. The receiver was the Appellants' witness. They put him in the witness box, and took such evidence of him as they thought. Now that they know where the shoe pinches they want to supplement his evidence by affidavit evidence which they could have tendered orally in the Court below. We ask the Court to proceed solely on the evidence taken below.

Cookson, Q C.:—It was by mere inadvertence that this evidence was not given in the Court below. The attention of the receiver was not then sufficiently called to the quarryable and non-quarryable portions of the estate. We wish to complete his evidence on that point, and are quite willing he should be cross-examined upon it.

JAMES, L.J.:—

I do not see how we can admit this evidence. The Appellants were not taken by surprise in the Court below. It was their own fault that they did not then tender this evidence. As at present advised I am of opinion that after a witness has been in the witness-box in the Court below, an affidavit of further facts which could then have been elicited from him ought not to be admitted on an appeal.

COTTON, L.J.:—

I am of the same opinion. Of course if this Court, for its own satisfaction, requires further evidence to be adduced, that is quite a different matter.

THESIGER, L.J.:—I agree.

Cookson, Q.C., and *Whitehorne*, on the main question, urged the same argument as in the Court below, and cited the same authorities, and also *Parker* v. *Gerard* (1); *Brooke* v. *Lord Hertford* (2);

(1) Amb. 236. (2) 2 P. Wms. 518.

Story v. *Johnson* (1); *Agar* v. *Fairfax* (2); *Cole* v. *Sewell* (3); *Gaskell* v. *Gaskell* (4); *Wills* v. *Slade* (5); *Baring* v. *Nash* (6); *Mitford*, Pl. (7).

JAMES, L.J.:—

I do not think we can differ from the conclusion at which the learned Judge has arrived. He took some pains to inquire into the case, and reserved judgment that precedents might be searched for, but was unable to find or hear of any authority which could lead him to a different conclusion from that which is, in my opinion, the law of the Court. In the course of the argument I asked Mr. *Whitehorne* if he could produce any authority where the Court had put an end to active overriding trusts such as exist in this case, and he admitted he could not. Now, first of all, the Plaintiffs could not have had a partition at Common Law, because they had no legal right or estate in the property, and, therefore, they are not within those old Common Law authorities to which we have been referred. Then to adopt the language of Mr. Justice *Fry*. He says (8): "Have they any better right in Equity?" and he states that no authority could be produced to him for such jurisdiction as he was asked to exercise. Then he continues: "Is there any principle on which I ought to exercise such jurisdiction?" And he answers that question in the negative, because the effect of granting partition would be to extinguish those active trusts which the testator directed to be carried on during the lives of his daughters, and would stop the business of working the quarries, and would divide the property in a manner inconsistent with the exercise of those powers which the testator thought fit to create. I quite concur in those observations. This testator has imposed trusts on the property, as to which there is no person in existence capable of putting an end to them, supposing the tenant for life desired to have those trusts carried into effect. Under those circumstances, it appears to me that we should, by granting this partition, be destroying the will

(1) 2 Y. & C. Ex. 586.
(2) 1 Wh. & T. L. C. 3rd Ed. p. 407.
(3) 17 Sim. 40.
(4) 6 Sim. 643.
(5) 6 Ves. 498.
(6) 1 V. & B. 551.
(7) Page 143.
(8) 13 Ch. D. 227.

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of the testator and in fact be making a new disposition of the property for him. I think, as the learned Judge has said, there may possibly be cases in which an equitable owner may obtain partition, but, without saying that no such thing can exist, it appears to me I should be doing wrong in this case to make a decree for partition the result of which would be to cause the trusts of this will to be administered separately as to the different persons entitled. Of course some of the persons beneficially entitled may say, "We do not like it," but they must take the property as the testator has given it to them.

COTTON, L.J.:—

I am of the same opinion. I was rather struck, looking at the statement of claim, by the mode in which the Plaintiff seeks a partition. The prayer is, "That the shares may be declared to be held on trust, as to one moiety, for two persons, and, as to the other moiety, for other persons." That seems to me peculiar.

No case has been cited similar to this. The difficulty is not simply that there is a legal estate outstanding, but there are active trusts to be performed which may for some purpose require, in order that the testator's intention should be carried into effect, that the property should remain as an entirety in the trustees during the continuance of those trusts, and the persons seeking a partition are not in a position, having regard to their estates and interests, to put an end to those trusts. Therefore they must take the property subject to the testator's will, and to the trusts which he has directed to be performed. Though I cannot say that there is no state of circumstances where, although active trusts are to be performed, there may be a partition, yet, in the present case, I agree with Mr. Justice *Fry* that, having regard to the circumstances which exist in it, there ought not to be a partition.

THESIGER, L.J.:—

I am of the same opinion and for the same reasons.

Solicitors: *Torr & Co.; Johnson & Weatherall.*

WEBSTER *v.* BRITISH EMPIRE MUTUAL LIFE ASSURANCE COMPANY.

C. A. 1880 June 12, 15.

[1879 W. 221.]

Life Policy—Equitable Mortgage by Deposit—Death of Assured—Dispensing with Legal Personal Representative—Payment to Equitable Owner—Interest —3 & 4 Will. 4, c. 42, ss. 28, 29—Chancery Amendment Act, 1852 (15 & 16 *Vict. c.* 86), *s.* 44.

In 1847 *A.* deposited a policy on his own life with *B.* as security for an advance of money, and died in 1874 insolvent, and no administration was taken out to his estate. In 1875 *B.* proved *A.*'s death to the satisfaction of the assurance company, and demanded payment of the policy moneys, which were insufficient to pay his debt, but the company refused to pay him without the consent of the legal personal representative of *A.*

In 1878 *B.* died, and on action brought by his executors against the company claiming a declaration that they were entitled to the policy moneys, and payment with interest from the time when the demand of payment was made, *Jessel*, M.R., 1, held that the company was justified in refusing to pay over the policy moneys without the consent of *A.*'s legal personal representative; 2, dispensed with the legal personal representative of *A.* under the *Chancery Amendment Act*, 1852, s. 44; and 3, ordered payment of the policy moneys, with interest at 4 per cent. from the date when demand of payment was made.

On appeal on the question of interest:—

Held, that as the default or delay in payment of the policy moneys had been caused, not by the company, but by *B.*'s neglect to clothe himself with a legal title to the money, interest did not commence to run till the order for payment of the principal was made.

Crossley v. *City of Glasgow Life Assurance Company* (1) overruled on this point.

Quære, whether, in an action by an equitable mortgagee of a life policy against the assurance company claiming payment of the policy moneys, the Court has jurisdiction, under the 44th section of the *Chancery Amendment Act*, 1852, to dispense with the legal personal representative of the assured.

THIS was an appeal from the decision of the Master of the Rolls.

In March, 1847, a policy for £500 in the Defendant company on the life of *Robert Brown* was by him deposited with his brother *William Brown* as security for £435 advanced to him by *W. Brown*. By the policy it was provided that the funds and pro-

(1) 4 Ch. D. 421.

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perty of the Defendant company should be subject and liable to pay, within two calendar months next after satisfactory proof should have been made according to the rules and practice of the Defendant company of the death of *R. Brown*, unto the executors, administrators, or assigns of *R. Brown* the sum of £500 thereby assured, and all bonuses and additions thereto.

In 1848 *R. Brown* ceased to pay the premiums on the policy, and *W. Brown*, in order to keep the policy on foot, was compelled to pay the premiums from November, 1848, to December, 1874, when *R. Brown* died. The premiums so paid by *W. Brown* amounted to the sum of £578 10*s.*

No written assignment of the policy to *W. Brown* was ever executed by *R. Brown* during his life, and shortly after his death notice of the said deposit of the policy was given by *W. Brown* to the Defendant company.

Satisfactory proof of the death of *R. Brown* was given to the Defendant company on the 28th of January, 1875; and according to the rule of the Defendant company, the sum of £500, together with bonuses to the amount of £197 10*s.* 5*d.*, became payable on the 28th of March, 1875, payment of which sums was shortly afterwards demanded by *W. Brown*, but the Defendant company declined to pay the same except to or by the consent of a duly constituted legal personal representative of *R. Brown*.

R. Brown having died insolvent, his executor, *Eleanor Brown*, refused to prove his will, and thereupon *W. Brown* took steps with a view of proving the will himself, but died in October, 1878, without having done so. The Plaintiffs were the executors of *W. Brown*, and, being unwilling to prove the will of *R. Brown*, commenced this action claiming a declaration that they were entitled to the moneys payable under the policy; interest on the same at £4 per cent. per annum from the 28th of March, 1875; and that the action might proceed in the absence of the legal personal representative of *R. Brown*.

The Defendants by their statement of defence averred that they had ever since the death of *R. Brown* been and were desirous to pay over the amounts due under the policy upon having a proper discharge for the same; that they had been obliged to keep and had kept the amount due on the policy at call and immediately

available; and submitted that interest was not properly payable by them.

The action came on for trial before the Master of the Rolls on the 14th of January, 1880, who, following his decision in *Crossley* v. *City of Glasgow Life Assurance Company* (1), dispensed with the presence of a legal personal representative of *R. Brown* under the power given to the Court by the *Chancery Amendment Act*, 1852, s. 44, ordered payment to the Plaintiffs of the policy moneys with interest as claimed; but allowed the Defendants to retain out of the funds in their hands their taxed costs as between solicitor and client on the ground that they were justified in declining to pay over the policy moneys without the consent of the legal personal representative of *A.*, or the sanction of the Court.

The Defendants appealed against so much of the judgment of the Master of the Rolls as directed them to pay interest from the 28th of March, 1875.

The appeal came on to be heard on the 12th of June.

Davey, Q.C., and *Millar*, Q.C., for the Appellants:—

The question is, whether interest is payable from the date fixed for payment of the policy moneys, which in this case was two months after satisfactory proof of the death of the assured, or from the date when, under the judgment of the Court, there was a hand ready to receive it, and the company thereby obtained an indemnity. We say that the interest was not payable until there was a hand ready to receive the principal under the order of the Court. The Respondents rely on 3 & 4 Will. 4, c. 42, ss. 28, 29, but the Act applies to legal demands only. They brought their action to establish their equitable title. Therefore, if the analogy of the Act applies, the allowance of interest is in the discretion of the Court, because by the Act the giving of interest, and that under either section, is left to the discretion of the jury. If there had been delay in payment by the company, we admit that a jury would have been directed under the Act to give interest by way of damages from the day on which payment should have been made. But here the company were always ready and willing to pay, and the delay was caused, not by any default on their part, but by the

(1) 4 Ch. D. 421.

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negligence of the creditor. It is not a case in which a jury would, under the Act, give interest by way of damages. The company could do nothing to remove the difficulty. Their position was most embarrassing, because the *Statute of Limitations* does not run until a legal personal representative is appointed. They could not pay the money into Court under the Trustee Acts: *Matthew* v. *Northern Assurance Company* (1); nor under the *Judicature Act*, there being no conflicting claims.

The authorities shew that interest is not payable unless there be an express or implied contract to pay it, or where it is given by way of damages for breach of a contract, or for an unlawful detention, or wilful default in payment of a debt: *Cameron* v. *Smith* (2); *Higgins* v. *Sargent* (3); *Attorney-General* v. *Corporation of Ludlow* (4); *Cook* v. *Fowler* (5); *Seton* on Decrees (6). This case is not within that proposition. How could there be default in payment, when there was no one to whom it could be paid? This was a justifiable detention or retainer of money until a proper discharge could be given. In *Bushnan* v. *Morgan* (7) no interest was given, but that was a case before the Act. In *Wolfe* v. *Findlay* (8) a firm who refused to pay over money without a proper discharge were held not liable to pay interest, although the money had been in their hands for ten years. No doubt the Master of the Rolls, in *Crossley* v. *City of Glasgow Life Assurance Company* (9), refused to follow *Wolfe* v. *Findlay*, and approved of an unreported case of *Bahre* v. *Murietta* (cited *sub nom. Barlee* v. *Murietta*), in which moneys due on bills of exchange were ordered to be paid into Court with interest, but the order was varied on appeal (June 27, 1871), and the question of interest was reserved, and when the cause was heard on further consideration by the present Master of the Rolls, a claim was made for interest, and was disallowed. *Turner* v. *Burkinshaw* (10) is also in our favour. We submit that there has been no improper detainer, no refusal to pay, and therefore that no interest by way of damages is recoverable.

(1) 9 Ch. D. 80.
(2) 2 B. & A. 305.
(3) 2 B. & C. 348.
(4) 1 H. & T. 216.
(5) Law Rep. 7 H. L. 27.
(6) 3rd Ed. p. 799.
(7) 5 Sim. 635.
(8) 6 Hare, 66.
(9) 4 Ch. D. 428.
(10) Law Rep. 2 Ch. 488.

Ince, Q.C., and *Bramwell Davis*, for the Respondents:—

Formerly interest was only given in equity as well as at law from the time of demand made, or from the period fixed for payment, or where there was an express or implied contract that interest should be paid: *De Havilland* v. *Bowerbank* (1); *Lowndes* v. *Collens* (2); but interest was not given on a policy of assurance: *Kingston* v. *M'Intosh* (3). Then came the statute 3 & 4 Will. 4, c. 42, which provides, sects. 28, 29, that in certain cases a jury may in their discretion give interest by way of damages. The jury, therefore, were freed from the trammels of the old law, and might look at all the circumstances of the case, and give interest where a person withholding money had invested, or had the power of investing the money. This case comes under both sections of the Act.

[THESIGER, L.J.:—The practice at law and equity was adopted, not overruled, by the statute, which is declaratory merely. Interest is payable in such cases by way of damages only.

COTTON, L.J.:—How could there be any withholding or detention of the money when there was no hand to receive it?]

We submit that the Plaintiffs were the persons to receive the money. They were the real owners. This action was not to establish their title, but to remove mere technical legal disability. We could have given a perfectly good discharge in equity, a better one in fact than the legal personal representative, and the company would have been quite safe in taking an indemnity from us. Assume they had paid us, and then the legal personal representative had brought an action against them, they could have made a perfectly good answer in shewing that they had paid us, and that our debt exceeded the amount they had paid us. There has been no default on our part except the delay in clothing ourselves with a legal title, and for that delay and default we have had to pay the costs of the suit. *Cook* v. *Fowler* (4) is really not in point. The only question there was, what rate of interest should be paid; and the same question arose in *In re Roberts* (5). We submit that

(1) 1 Camp. 50.
(2) 17 Ves. 27.
(3) 1 Camp. 518.
(4) Law Rep. 7 H. L. 27.
(5) 14 Ch. D. 49.

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under the Act the Court has a discretion to give or refuse interest, and that no case has been made out for interfering with the discretion which the Master of the Rolls has thought fit to exercise.

JAMES, L.J.:—

I am of opinion that we must differ from the conclusion at which the Master of the Rolls has arrived. A policy of assurance does not bear interest. That is conceded on all hands. In itself, there is neither an express nor an implied contract to pay interest on the amount payable. Under the Act 3 & 4 Will. 4, c. 42, whether it comes within any common law principle or not, anything in the nature of interest can only be given, in my view, as damages for the wrongful detention of money which ought to have been paid. In this case I cannot see the slightest ground for imputing any wrong whatever to the assurance office. The assurance office were always ready and willing to pay upon receiving a valid discharge and upon being reasonably satisfied that there was a person capable of receiving the money so as to give them a valid discharge. They were guilty of no default and no delay whatever. The Plaintiffs were guilty of default, if it is to be called guilt, or delay, or rather the person in whose right they are suing, because he did not choose to do that which it was perfectly clear it was open to him at any time to have done, namely, to have clothed himself with the legal representation which was required to complete his title. He was not bound to incur the expense of taking out administration or make himself liable to the responsibility of an administrator, and, therefore, he did not choose to clothe himself with a legal title. It seems to me it would be a monstrous thing to say that the assurance office was in any way in default, or that they brought themselves within any ground whatever on which a jury would give damages. It has been suggested that the assurance company had the money, and that they have made a certain use of it. There is no evidence given by the Plaintiff, nor any interrogatories addressed to them upon that. On the other hand, so far as we have evidence at all the evidence of the secretary is precise that they have always expected to be called upon on any day to pay it, and that they always expected the title would be completed, and that, upon

it being completed, they would pay it, and therefore they had the money at call at their bankers. They had the money to meet this demand and other demands which had ripened into claims. Assurance companies do prepare themselves and they do keep a balance at their bankers with reference to the deaths of which due notice has been given to them, and as to which, in the ordinary course of things, they may be called upon to pay at any hour. After proof of death had been given, there would be nothing for them to wait for but the production of the proper legal authority to receive the money, and they must be ready to hand it over the next day. Assurance offices do not take any time, after the title is proved, in paying the money. It seems to me that it is not reasonable or just to make this assurance company pay interest for the money; the delay in paying which has been entirely due to the Plaintiffs' testator, who did not choose to clothe himself with a legal title.

COTTON, L.J.:—

The question we have to consider is, whether interest has been properly given as against the Defendants. The instrument sued upon was a policy of assurance. It contained no stipulation whatever that the company should, under any circumstances, pay interest. Interest, therefore, is no part of the debt or of the sum stipulated by the contract to be paid. If it can be recovered, it must be in the nature of damages. I say so because, whether it comes under sect. 29, where it is clearly to be granted, if granted at all, in the nature of damages, or under sect. 28, where the language is different, in both cases it comes as damages and is referable to the principles upon which damages can be given. In the case of a policy of assurance subsequently to the Act, as much as in a case before the Act as regards other instruments, where no stipulation appears for payment of interest but where it was left to the jury that they might grant interest or not as they thought fit, they would grant it by way of damages. I will refer to what was said by Mr. Justice *Bayley* in *Cameron* v. *Smith* (1), which was an action upon a promissory note—one of the instruments where there was no stipulation for interest, but where,

(1) 2 B. & A. 305.

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nevertheless, the jury gave interest by way of damages or gave damages calculated according to the rate of interest. He says this (1): "Although, by the usage of trade, interest is allowed on a bill, yet it constitutes no part of the debt, but is in the nature of damages which must go to the jury in order that they may find the amount; and it is competent for them either to allow £5 per cent. or £4 per cent. according to their judgment of the value of money, or they may even allow nothing, in case they are of opinion that the delay of payment has been occasioned by the default of the holder." In another case, which was referred to in the course of the argument, damages were said to be given for the detention, that is, for the wrongful detention, of the money; and of course it would be hardly necessary to mention that the only damages, as a rule, given for the improper detention or refusal to pay money, are interest; loss of interest being the damage which the law supposes a man suffers, except under special circumstances, for non-payment of money to him. What we have to consider, therefore, is this: whether there is anything to justify the finding of the Master of the Rolls that there was any default or neglect to pay the money by the Defendant company. If there was not, then the principle on which interest should be granted—that is, by way of damages—fails. The Master of the Rolls followed his former decision in *Crossley* v. *City of Glasgow Life Assurance Company* (2), which he thought decided this case upon many points. There the facts were very simple. In that case he gave, as he has given here, the assurance office all their costs as between solicitor and client, and he did so on the ground that they were justified in declining to pay the money without the decree of the Court. In the present case, it has not been questioned before us that the decree of the Court below gives a complete exoneration or discharge to the assurance office. It must not be assumed that we decide that that is so. That question is not before us, but it may hereafter arise. The Master of the Rolls in both cases decided that the decree of the Court would be a complete indemnity to the assurance office, upon this ground, that, although there was no legal personal representative to give a discharge to the office, yet he had the power to dispense with the

(1) 2 B. & A. 308. (2) 4 Ch. D. 421.

presence of the legal personal representative; and that his decree, made in the absence of the legal personal representative under that power, would be a good discharge to the office. That is, in fact, a decision that until the decree the office could not reasonably be called upon to pay. Therefore, although no doubt it is the fact that the Plaintiff had a title established by the decree, yet the Master of the Rolls' decision as to costs and the whole grounds of his judgment are, that the assurance company were justified in coming here to get what they otherwise could not get, namely, a good discharge. That being so, he in fact decides that they are in no default, and if they are in no default, on what ground can damages be given to the Plaintiff? Damages must be given in consequence of the Defendant withholding something to which the Plaintiff is legally entitled; but if he is not legally entitled to receive this money, and if the company is not bound to pay it because he cannot give a good discharge until the decree of the Court, how can there be any default on the part of the company? At once that brings it near to what I read from Mr. Justice *Bayley's* judgment, and if that is so, the default was on the part of the Plaintiff's testator in not taking an assignment by which he could have given a good discharge, or in not bringing the action sooner, or in not taking out letters of administration to the deceased debtor. As that is so, there is no default at all on the part of the Defendants. There was neglect or default on the part of the Plaintiffs, who come here seeking to recover their money, and to whom the Master of the Rolls has granted interest by way of damages. In my opinion that cannot be supported. Although it is within the discretion of the jury what damages they are to give, or whether they should give damages at all, yet if the facts in evidence before them were not such as to lay a foundation for damages, or if the facts in evidence before the Judge below were not such as to justify the exercise of the discretion which he has assumed to exercise, that is a case in which the Court of Appeal may, and, in my opinion, is, bound to act upon its own view of what is the legal result of the facts in evidence. In my opinion, therefore, we must discharge so much of the judgment of the Master of the Rolls as gives interest to the Plaintiffs.

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THESIGER, L.J.:—

I am of the same opinion. The Master of the Rolls has assumed, and I think properly assumed, that in this case there was no default on the part of the company. He has stated (and I am of the same opinion) that, in this case, the Plaintiffs had no power to give a legal discharge to the company until the judgment was obtained from the Master of the Rolls. The Master of the Rolls has acted upon that statement and upon the assumption to which I have referred, by giving to the company all the costs of the action. Now, that being so, upon what principle do the Plaintiffs rest their right to obtain interest from the company? They rest it, first of all, upon the statute of 3 & 4 Will. 4, c. 42, or upon the analogy of that statute. There are two sections in that statute which have to be dealt with—sects. 28 and 29. In considering what is the meaning and what is the effect of those sections it is not unimportant to see how the matter, as regards interest, stood, both at Common Law and in Equity, before that statute was passed. As regards the matters which are dealt with by sect. 28, it appears to me, although perhaps it is not necessary to give a definite opinion upon the point, that that section is only declaratory of what the law was before the statute was passed. I find it laid down by Sir *William Grant*, in *Lowndes* v. *Collens* (1), that "wherever there is a written contract for a sum of money payable upon demand, or upon a day certain, interest is payable from the time of the demand made or from the fixed period of payment, and there is no difference whether that contract is contained in a promissory note or any other instrument. It would be very inconvenient that a different rule should prevail at Law and in Equity with regard to that question. It came often before Lord *Alvanley*, who had occasion to consider it much in many other cases besides *Upton* v. *Lord Ferrers* (2), particularly in *Parker* v. *Hutchinson* (3), where he states the practice at law as to notes payable at a day certain, or a written undertaking to give interest." Sir *William Grant* there uses the expression "payable," but it is obvious, from the cases which have been cited before us, that interest was not absolutely payable under

(1) 17 Ves. 28. (2) 5 Ves. 801.

(3) 3 Ves. 133.

those circumstances, but it was only payable where there was default as regards the person who had to pay the principal sum. That was stated by Mr. Justice *Bayley* very clearly in the case of *Cameron* v. *Smith* (1) in reference to bills of exchange; which, although they may have been dealt with under the Common Law, yet would be dealt with in the same manner in which other matters would be dealt with under sects. 28 and 29 of the Act, and it is stated in equally clear terms in Equity in the case of *Wolfe* v. *Findlay* (2). Now, that being so, and although contracts in written instruments payable after demand, or contracts under written instruments payable at a fixed day carried interest where there had been default in payment, it appears to have been the opinion of Judges at Common Law that no interest was payable in respect of a policy of life assurance; and the statute appears to have had reference, therefore, both as to what existed at Common Law and in respect of which interest was payable, and in respect of a matter of life assurance; but, whether you deal with sect. 28 or sect. 29, this much is clear—that the principles as regards allowance of interest which existed before the statute are carried out by the Legislature under the statute. There is no power, on the part of a jury, or, rather, a jury would be recommended by the Judge not to give interest in cases where there has been no default on the part of the person against whom interest is claimed. Well, that is the case clearly at Common Law under the terms of the statute; and it appears to me that it must be equally clearly so in an action in a Court of Equity, founded upon the analogy of the statute. I think, as regards this case, the matter comes clearly within the principle laid down by Lord *Westbury* in *Caledonian Railway Company* v. *Carmichael* (3), where he says: "Interest can be demanded only in virtue of a contract expressed or implied, or by virtue of the principal sum of money having been wrongfully withheld and not paid on the day when it ought to have been paid." Now, here, clearly there is no contract to pay interest, and here it is equally clear the money has not been wrongfully withheld. Then there is only one other matter remaining. I am of opinion that even if in this case it had been

(1) 2 B. & A. 308. (2) 6 Hare, 66.
(3) Law Rep. 2 H. L., Sc. 56, 66.

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shewn that interest had been received upon the money, there would have been no obligation on the part of the company to pay interest. But, in point of fact, upon the affidavit it appears that interest has not been made by the company; and I take it that, as a general rule, assurance companies would not make interest, under circumstances such as exist in the present case. We all know that, even with the largest assurance offices, they have to keep moneys ready in hand for the purpose of paying claims which will, from time to time, be made upon them; and the amount which from time to time they keep in hand is regulated by them—at all events, to a considerable extent—by the number and the amount of the claims which are probably about to be made against them. Therefore, whether one looks at the justice of the case generally, or at the facts of this particular case, or at the general law, it appears to me that no claim for interest can properly be made; and, inasmuch as the Master of the Rolls, in dealing with this case, has exercised a judicial discretion upon the facts before him, and has decided upon an erroneous principle, it appears to me that this Court ought to interfere with and overrule his discretion, if it can be called a discretion.

JAMES, L.J.:—

I think it right to say, as to what Lord Justice *Cotton* has said, that I am a little surprised at the decree being made at all in the absence of the legal personal representative. I should have thought it very doubtful. It might be convenient to the assurance office, but I should hesitate before I dispensed with the legal personal representative in such a case.

Solicitors for Appellants: *Watson, Sons, & Room.*
Solicitor for Respondents: *O. B. Wooler.*

MITCHELL *v.* HENRY.

C. A.
1880
M. R.
April 30.
C. A.
June 23, 26, 28.

[1879 M. 426.]

Registered Trade-Mark—Colourable Imitation—Trade Marks Registration Act, 1875.

The Plaintiffs registered a trade-mark for worsted goods described as "a white selvage on each side of the piece having a red and white mottled thread interwoven the full length of the selvage between the edge of the piece and the edge of the selvage," and deposited a specimen at the *Patent Office Museum*. The specimen so deposited was undyed, and the selvage was white, the warp being white cotton and the woof white mohair, and nearly in the middle of the selvage was a compound warp thread composed of a thread of white cotton and a thread of Turkey red cotton twisted together. When the goods were dyed black the cotton threads took the dye imperfectly, so that the warp threads in the selvage became grey, while the woof became black, so as to make the selvage dark grey, with a dark red mottled line running along it. The Defendants sold black mohair goods with a dark grey selvage of nearly the same shade as that of the Plaintiffs, with a twisted thread running along its inner edge, which thread was originally white, red, and yellow, but in the course of dyeing the white became dark grey, and the yellow a dark olive, which could hardly be distinguished. The Plaintiffs sought to restrain the sale of these goods as an infringement, and moved for an injunction. There was evidence that the selvage, though not actually white, was what was known in the trade as a white selvage:—

Held, by *Jessel*, M.R., that as the Plaintiffs' selvage was not white, and the mottled thread of the Defendants was different, and in a different position from that of the Plaintiffs, there was no infringement, and that an injunction must be refused.

Held, by the Court of Appeal, that the principles according to which the Court acts in preventing a man from passing off his goods as those of another are not altered by the *Trade Marks Registration Act*, and that the question could not be disposed of by simple inspection of the patterns without considering whether the selvage was not, according to the understanding of the trade, a white selvage, and if it was, then whether the differences in quality and position of the Defendants' mottled thread were sufficient to distinguish the Defendants' goods from those of the Plaintiffs, so as to prevent purchasers from being misled, and that as there was a conflict of evidence on these points the motion must stand over till the trial, the Defendants undertaking to keep an account.

THIS was an action by the Plaintiffs asking for an injunction to restrain the Defendants from using any of the registered trade-

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marks of the Plaintiffs, or any of them, or any colourable imitation of any such trade-marks in connection with any class of goods to which the same were registered as belonging, and from manufacturing, selling, or offering for sale, or otherwise disposing of or causing to be manufactured, sold, offered for sale, or otherwise disposed of, any goods having thereon any of the said trade-marks, or any colourable imitation of any such trade-marks, and from otherwise in any manner infringing the said trade-marks, or any of them—an account of profits—the delivery up of goods having the trade-marks on them for the purpose of having such marks cancelled—and damages for the infringement.

The trade-mark upon which the argument turned was advertised in the *Trade Marks Journal* of the 13th of January, 1877, as a trade-mark applicable to "worsted stuffs," by the following description :—

"A white selvage on each side of the piece having a red and white mottled thread interwoven the full length of the selvage between the edge of the piece and the edge of the selvage. (A specimen of this mark is now on view at the *Patent Office Museum, South Kensington*)."

The goods to which the Plaintiffs affixed this trade-mark were a class of mohair goods known as "brilliantine." The specimen deposited at the *Patent Office* was an undyed specimen. The woof was white mohair. The warp of the selvage was white cotton, except that along it, near the middle, there ran a compound warp thread consisting of two cotton threads twisted together, one being white and the other Turkey red. The rest of the warp was a dark grey or black mohair. The result was that the body of the stuff was grey, and the selvage white with a dotted red line running along it near its middle.

When the Plaintiffs' goods were dyed black and finished for sale the cotton threads did not take the dye so completely as the mohair threads, and did not turn black, but the white threads turned grey and the red thread assumed a dark red colour. The result was that the body of the piece was black and the selvage a dark grey with a darker line running along it, the redness of which would not at first be noticed by an unpractised eye.

The Plaintiffs at the same time registered six other trade-marks for worsted goods, each of which consisted of a white selvage with a twofold mottled thread interwoven, the only difference being in the colours of the mottled threads.

In 1879 the Defendants caused to be manufactured brilliantine, which in its undyed state differed from that of the Plaintiffs in the following particulars: the woof was grey, and between the body of the stuff and the selvage was a compound warp thread formed by twisting together three threads, white, red, and yellow. When the stuff was dyed black the body was black, the selvage dark grey, of much the same depth as that of the Plaintiffs, and a reddish line ran along the inner edge of the selvage. The effect of the black dye on the yellow thread was to leave it of a dark olive colour. The sale of these goods was the infringement of which the Plaintiffs complained.

The Plaintiffs moved for an interlocutory injunction, and adduced evidence from manufacturers at *Bradford* to shew that the selvage of their dyed goods was what was perfectly well known in the trade as a white selvage, and several of the Defendants' witnesses in their affidavits spoke of it as a white selvage. The Plaintiffs also adduced evidence that the selvage of the Defendants was one which would lead purchasers to believe that their goods were goods manufactured by the Plaintiffs. On the other hand, the evidence of the Defendants went to shew that persons in the trade would not mistake the marks for each other, and would not be misled.

The motion was heard before the Master of the Rolls on the 30th of April, 1880.

Chitty, Q.C., *Davey*, Q.C., and *Langworthy*, for the Plaintiffs, contended that the Plaintiffs' trade-mark was "a distinctive device" within the meaning of sect. 10 of the *Trade Marks Registration Act*, 1875, and that they were entitled to an injunction to restrain the Defendants from using their trade-mark or any colourable imitation thereof.

Aston, Q.C., *Ince*, Q.C., and *Rigby*, for the Defendants, were not called on.

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JESSEL, M.R.:—

The question that I have to decide is, whether the Defendants have or have not infringed a registered trade-mark. The Plaintiffs have a registered trade-mark, and I must say that I registered these trade-marks very unwillingly, for I thought them very bad as a distinctive device, but I do not feel myself at liberty, as Commissioner, to set my own opinion up against the wishes of the trade, and I therefore allowed them to be registered.

Then there came another difficulty, they could not be advertised except by description. There again, rather than throw that difficulty in the way of the wishes of the trade, a new scheme was hit upon of allowing the patterns to be put in the *Patent Office Museum*, which belongs to the Commissioners, who have also had the duty of registering the trade-marks, and to let them be exhibited there, because people could not advertise them.

But that being so, if the registration is good for anything, it is because the colours make the distinctive device. The Plaintiffs do not claim a selvage on each side of the piece, which would be absurd, for almost every piece has a selvage. Nor do they claim a white selvage upon each side of the piece, but what they do claim is a white selvage on each side of the piece having a peculiar thread interwoven. It must be recollected that these gentlemen are not registering old marks, but new ones, and therefore they have to point out to the world what they actually claim. I think they claim seven marks. I only refer to the other six to shew that they did claim as a distinctive mark the difference in the interwoven thread. All the seven registered marks are alike, with this distinction, that the interwoven thread varies in colour. The first is a blue and white mottled thread, the second is a red and white mottled thread, which is the one I have to consider, the third is a yellow and white mottled thread, the fourth is a violet and white mottled thread, the fifth is a brown and white mottled thread, the sixth is a green and white mottled thread, and the seventh is a black and white mottled thread.

I have read these descriptions to shew two things, first, that these applicants considered and wished to induce the public and the Commissioners of Patents to consider that it was a sufficient distinction between the seven trade-marks that there was a dif-

ference in the colour of the interwoven thread; and in the next place that the difference in colour would do, if one of the colours was varied, to make a sufficiently distinctive mark, because we find, for instance, the red and white mottled thread, the blue and white mottled thread, the yellow and white mottled thread, the violet and white, and the brown and white mottled thread, and the green and white and the black and white. So that keeping the mottled thread as white half its length, if you put a single colour in different that would make a new and distinct trade-mark, and a new and distinctive device. That is the representation with which the Plaintiffs come before this Court. So that if you put blue instead of red, or yellow instead of red, you make a new mottled thread.

Now, the Defendants have put a third device with three colours, white—if it is white—and red and yellow. Are they not entitled to say that that is a new and distinctive device? The only difference between the seven is that you put yellow instead of red. If you add yellow to the red there is a double variation. Instead of having two colours you have three, and one of them is a different colour, and so different that the applicants consider it makes a new mark, and they change yellow for red, or violet for blue, or whatever the colour is. How can people who have registered such a device be heard to say that the Defendants' is not a different device when the whole of the device consists really of the interwoven thread, and they not claiming, as they could not for a moment claim, the selvage.

That does not quite conclude what I have to say. I should have held that an interwoven thread must be placed as it is placed in their mark. They do not claim, of course, all the interwoven threads, but one interwoven thread between the edge of the piece and the edge of the selvage, that is, interwoven the full length of the selvage between the edge of the piece and the edge of the selvage. I must say that is how it is put in the registered mark. It is what I will call an interwoven thread running down the selvage. That is how it is placed, and that is what they have referred to.

The Defendants actually put theirs oddly enough at the ex-

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treme edge, so that the Defendants' really comes nearer to the description than the registered trade-mark as deposited by the applicants at the *Patent Office Museum*. As I see the mark (I have had the original before me, and it is difficult to explain what it is without looking at it), it is actually nearer the outer edge of the selvage than the edge of the piece. It does not therefore correspond with the description, which is between the edge of the piece and the edge of the selvage.

If, therefore, they are to be bound by what they have deposited, and not by what they have written, their mark must be put, not actually between the edge of the piece and the edge of the selvage, but very near the middle of the selvage; and when I look at their exhibit to shew how they place their mark, I see they do in fact place their interwoven thread near the middle of the selvage and not between the edge of the piece and the edge of the selvage. That would be a difficulty in their way which would be fatal. They are bound to use their mark as deposited (and they do not use it as deposited), and not merely as described without what is deposited, and which answers the place of the advertisement; but they do so use it in the way I have mentioned, whilst the Defendants place their thread between the edge of the piece and the edge of the selvage—that is, at the inner edge of the selvage.

Now I come to another point which I think is quite as fatal to the Plaintiffs' claim. What they claim is not merely the red and white mottled thread interwoven into the selvage, but the white selvage on each side of the piece having this thread interwoven. Here, again, when I look at their deposit—I do not say it is a very brilliant white, for it is not; it is a dirty white—it is not unfairly described as white, and anybody looking at the selvage would know it was a dirty white. Nobody could be accused of absurdity who said it was a white selvage, especially looking at the grey piece which is next to it. Now, what the Plaintiffs actually use is the black selvage which I hold in my hand. These things are only intelligible by looking at them together, and the way to look at them is to put one below the other; and I ask if that is the trade-mark with the red and white line in it, if that black is the same thing, and if that mottled thread that has red

in it, but which by reason of the dye has become dark brown, can be called the red and white mottled thread which we have in the deposited mark.

I say that that is a black selvage and not a white selvage, and that the mottled thread running through it is not white and red but white and brown. What they have registered is not that which is denominated white selvage according to the custom of trade at *Bradford*, but white selvage simply. The man happens to live at *Bradford*, and he has his name and address there, but there is no allusion to *Bradford* in the trade-mark. It is simply white selvage. He might go the next day to *Manchester* and use this trade-mark, where they have different ideas as to what is white and what is black. It is absurd to say that, because certain people call that white or a white selvage according to the custom of the trade at *Bradford*, they have registered anything of the sort. They have registered merely white, and in my opinion it is impossible to say that the thing which they use as white can be described as white.

Then, the last objection is that what the Defendants use is a black selvage, and therefore to make it an infringement of the trade-mark the Defendants are entitled to say, "Look at the registered trade-mark. We do not care what the Plaintiffs use which they have not registered; they cannot sue us for that which is a new mark; we use a black selvage, or a very dark grey selvage;" for it does not matter which it is called—one is a dark grey and the other I should call black, but neither of them white. I think that it is impossible to say that any one of the specimens used by the Defendants can be described as otherwise than a dark grey or black.

The Plaintiffs can only complain of infringement of that mark which is white with the thread through it, but to ask me to hold that the Defendants, by using the black or dark grey selvage with the mottled line, which has very bad and indistinct colours in it also (for the dye has affected the yellow and red very much in the same style as it has affected the Plaintiffs' red), are using the same thing as the Plaintiffs' registered trade-mark, is asking me to disbelieve the evidence of my own eyes, which are the only means to guide me in these matters when I sit both as Judge and

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jury; and as to which I must say I have no doubt whatever that the colours dark grey or blackish grey used by the Defendants are not the white registered by the Plaintiffs, nor is the thread they use the white and red thread which has been spoken of.

In my opinion, therefore, the Plaintiffs' case entirely fails, and I must refuse the motion. As I have decided upon the merits, I refuse it with costs.

C. A.

The Plaintiffs appealed, and in support of the appeal motion adduced evidence from witnesses in *Leeds*, *Manchester*, *London*, *Belgium*, *France*, and *Germany*, that the selvage of the Plaintiffs' goods in their dyed state was what was called in the trade a white selvage. The appeal came on for hearing on the 23rd of June.

Chitty, Q.C., *Davey*, Q.C., and *Langworthy*, for the Appellants:—

We put our case thus: The distinctive mark which we have registered is a twist of white and red in a white selvage. In the course of dyeing the colours are affected, so that the selvage in the dyed goods is not really white, but it is still what is called in the trade a white selvage. Even the Defendants' witnesses speak of it as such. The mark of the Defendants is practically the same as ours, and is calculated to deceive. The Master of the Rolls held that if in the dyeing the colours were so affected that you cannot on inspection predicate of the selvage that it is white, and that the twisted thread is mottled, red, and white, then, as a matter of law, the protected trade-mark is not infringed, and the Plaintiffs have no remedy. We say that the understanding of the trade must be referred to. The marks are trade-marks: the registration is intended to shew people in the trade what the marks of other manufacturers are, and a description of them ought to be construed according to the understanding of the trade. Many things which are called white are not really white; a white man is not pure white, a delicate white hand is not pure white, a white hat is not pure white, and white wine is not pure white. There is therefore no such absurdity as the Master of the Rolls seems to suppose in calling this selvage white. Our evidence shews that the Defendants' goods can be passed off as goods made by the Plaintiffs by reason of the similarity of the selvages.

Aston, Q.C., *Ince*, Q.C., and *Rigby*, for the Respondents:—

Looking at the deposited specimens, as well as the descriptions, there are three things which go to make up the distinctive character of the Plaintiffs' marks—a twofold mottled thread—special colours of that thread and the position of that thread. The Defendants' thread differs from that of the Plaintiffs in all three particulars.

[COTTON, L.J.:—Do you contend that the new Act has done away with the old law restraining a man from using a mark which is so like that of another manufacturer as to be liable to be mistaken for it?]

Certainly, though the facts do not really raise the question here, for the Plaintiffs do not put the case of a fraudulent attempt to pass off our goods for theirs, and the Defendants had never any intention to pass off their goods as those of the Plaintiffs. Now as to the position of the thread, the description says it is "interwoven the full length of the piece between the edge of the piece and the edge of the selvage," *i.e.*, it is to be interwoven in the selvage, inserted in such a way that there can be no mistake as to its being part of the selvage: there must be a substantial part of the selvage between the mottled thread and the body of the piece. Now our thread is between the selvage and the body of the piece.

[JAMES, L.J.:—Suppose this difference is not enough to prevent your goods from being mistaken for those of the Plaintiffs, are you at liberty thus to imitate their mark?]

We contend that the Plaintiffs must be held to the thing they have registered and the specimens they have deposited. Before the Act it was necessary for a person who complained of the infringement of a trade-mark to shew that it had been long used by them and was well known. The registration dispenses with that, and as a compensation to the public for the privilege thus given to the manufacturer, he is bound to define clearly what he claims, so that no person can be misled as to what he is entitled exclusively to use.

[THE COURT here asked whether the Defendants would be

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satisfied with allowing the motion to stand over till the trial, they keeping an account. Counsel for the Defendants assenting to this, were not further called upon.]

Davey, in reply.

JAMES, L.J.:—

I think that the motion must stand over to the hearing. It has been disposed of by the Master of the Rolls in a mode so different from what appeared to me to be the mode in which such a question ought to be disposed of, that although this is only an application for an interlocutory injunction I thought it necessary that the matter should be fully gone into, for I cannot agree with the Master of the Rolls that the question can be disposed of summarily by answering two questions—Is that selvage white? Is the twisted thread of the Defendants in the same position as the twisted thread of the Plaintiffs? The Master of the Rolls seems to have considered that when he had satisfied himself by examination of the patterns before him, that the twisted thread of the Defendants was in a position different from that of the Plaintiffs, and that the selvage, when looked at, could not be said to be white, the question was disposed of in favour of the Defendants. I am bound to say that, in my opinion, the question is not whether the selvage is white, but whether it is what the trade know as a white selvage, whether anybody connected with the trade could have any doubt that it came within the description of a white selvage. Then, again, to my mind, the fact that the position of the Defendants' thread is not the same as that of the Plaintiffs' thread, is not at all conclusive. The question resolves itself into the old question, which has always been the question to be determined in these cases—are the Defendants, not in words, but by acts, and by something on the face of their goods, representing their goods as being the goods of the Plaintiffs—that is to say, are they using some mark which is calculated to pass off their goods as the goods of the Plaintiffs? On that it is very material that every person in the position of the Defendants should be advised by counsel, who have read, no doubt, what was said by the House of Lords in *Singer Machine Manufacturers* v.

Wilson (1), in which their Lordships, or most of them, did not assent to a proposition which was originally laid down by the Master of the Rolls, and afterwards adopted by the Court of Appeal, of which I was a member, but laid down the principle that even if it were made out that the Defendants had originally adopted a mark honestly and innocently, either in ignorance of the existence of the Plaintiffs' mark, or in the belief that their mark was so different from that of the Plaintiffs' as not to be calculated to mislead an ordinary purchaser, their continuing to use the mark after they became aware that their use of it did cause their goods to be mistaken for the goods of the Plaintiffs, would be not less fraudulent in the eye of the Court than if they had originally begun to use it with a fraudulent intent. The Defendants must bear in mind that the original honesty of intention does not protect the continued user, if the user is found practically to have the result of deceiving, or is calculated to deceive purchasers, because it is very easy for manufacturers to avoid any possibility of misleading purchasers if they are minded to avoid it.

As regards the evidence I will not give any opinion on which side the balance of evidence appears to me to lie. There is a great amount of evidence in support of the Plaintiffs' case, and there is on the other hand a great amount of evidence on the part of the Defendants to the effect that an ordinary purchaser would not be likely to be deceived. Probably a large percentage of purchasers would not be deceived, but there is such a conflict of evidence that in my opinion the matter cannot be safely dealt with upon an interlocutory application when the witnesses have not been cross-examined. In order to come to a satisfactory conclusion it is necessary to know what the witnesses would say when they are using their own words in answer to questions not leading, whereas we have before us only affidavits which are answers in the solicitor's words to questions the most leading possible.

Then with regard to the balance of convenience and inconvenience, it seems to me by far the most convenient course that no injunction should be granted, and that the motion should stand over to the hearing, the Defendants undertaking to keep an account. The Plaintiffs can protect themselves, as they have to a great

(1) 3 App. Cas. 376.

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extent already done, by circular. Moreover, the pendency of these proceedings will be perfectly well known. Every large purchaser in *Bradford* or elsewhere will know of them, and will know that he will incur liability if he makes himself a party to any continued infringement of the Plaintiffs' rights, should those rights be established at the hearing. If that should be the result of the action the Defendants who undertake to keep an account will be liable to pay to the Plaintiffs every farthing of the profits they make by the sale of goods by which the Plaintiffs' mark is infringed, and will find themselves in this position, that they will have been using a trade-mark which they will be prevented from using afterwards, and so will lose all the reputation they have been acquiring in the meantime. Then again the Plaintiffs will be relieved from the necessity of giving an undertaking to abide by any order as to damages if the Defendants should prove successful at the hearing. Therefore on the balance of convenience and inconvenience, and having regard to the fact that the decision of the Master of the Rolls was in favour of the Defendants, which ought not to be overlooked on an interlocutory application, I am of opinion that the better way will be to let the motion stand till the hearing, the Defendants keeping an account. We must discharge the order of the Master of the Rolls, and make the costs of both parties costs in the action.

COTTON, L.J.:—

I am also of opinion that in this case we are not in a position to grant an interlocutory injunction, or to decide on the rights of the parties, and that all we can do is to discharge the order of the Master of the Rolls, and direct the motion to stand to the hearing. But before I give my reasons for coming to that conclusion, I think I ought to state for the guidance of the parties what in my opinion is the question to be decided. It was put prominently by the counsel for the Defendants that the question was very different now from what it was in former days, when the Court of Chancery was applied to to restrain the infringement of a trade-mark. A trade-mark then signified a mark to the use of which the Plaintiff had by user entitled himself, and the injunction was obtained where the Defendant was marking his goods with a mark so

similar to that used by the Plaintiffs as to be calculated to pass them off as the goods of the Plaintiffs. Of course, in order to enable the Court to arrive at that conclusion, it had to be shewn that the Plaintiffs had for a period of time been selling their goods with a mark which distinguished them. For the purpose of seeing whether or not the mark upon their goods did distinguish them, it was of course necessary to see what marks were in common use by the trade as regards that particular class of goods, and then, having ascertained that fact, it had to be considered whether, having regard to the marks which were in common use, what was being done by the Defendants was calculated to pass off their goods as the goods of the Plaintiffs. How is this altered? It was contended in argument that the *Trade Marks Act* has entirely altered the question. I do not say that the effect of the Act may not be to give a person an absolute right to the registered trade-mark so as to entitle him to restrain another person from selling goods with that mark upon them without reference to the question whether or no the goods are sold under such circumstances as to pass them off as the goods of the Plaintiffs. I say nothing upon that point, but I say that, in my opinion, the Act in no way interferes with the exercise by a Court of Equity of its old jurisdiction. What the Act does, as I understand it, is this:—It enables persons to register a trade-mark, and when they register it that is equivalent to evidence of public use of it by them, and during five years the registration is *primâ facie* evidence of their exclusive right to it, and after the five years it is conclusive evidence of such right. Assume here that the Plaintiffs have the exclusive right to this trade-mark, that is to be taken into consideration in determining whether or no the Defendants are marking their goods in such a way that they are calculated to be passed off as the goods of the Plaintiffs. The question is not simply whether or no, putting the Plaintiffs' and Defendants' marks side by side, one might be so different from the other as to be capable of registration as a distinct mark, or whether the Plaintiffs have themselves registered trade-marks which have no greater distinction between them than the distinction between the mark of the Plaintiffs and that of the Defendants, for slight distinctions between the Plaintiffs' marks may distinguish different classes of the Plaintiffs' goods, but the question,

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in my opinion, is whether the Defendants are so selling their goods as to pass them off as the goods of the Plaintiffs. Here it is contended that the Defendants had no intention of passing off their goods as the goods of the Plaintiffs. Assume that was so, and that they thought they had a right to register under the Act, and use the mark they are using. In my opinion, if in fact that mark is calculated to pass off their goods as those of the Plaintiffs, then although originally they thought they had a right to do it, and they did it honestly, yet if they continue after objection to use that which is calculated to pass off their goods as those of the Plaintiffs, a Court of Equity ought to interfere by injunction. The Master of the Rolls seems to have decided the case, as far as I can see, upon this ground, "What is claimed by the Plaintiffs is a double thread on a white selvage; if that is distinctive, then what the Defendants are using, namely, a triple thread upon a white selvage, must be a distinctive trade-mark, and therefore I cannot restrain the Defendants." If that was the *ratio decidendi*, in my opinion that was erroneous, because he has not entered into the question whether the use of that triple thread was calculated to pass off the goods of the Defendants as the goods of the Plaintiffs. He also goes into the question whether this can be properly called a white selvage. In my opinion it is unnecessary to go into the distinction between the selvage being actually white and its being a white selvage as it is called in the trade. What is registered is this: a particular thread in what is called in the letterpress, and by reference to the deposited specimen, a white selvage. It is not absolutely white, but it is called white. That which was deposited was the undyed specimen of the goods, and every one in the trade must be aware that that specimen was a specimen which would be dyed before it was used, probably in many cases before it was sold, and then if that is so, and the mark is on the goods as dyed, I can see no reason why the Plaintiffs, putting on their goods as dyed, or having on their goods when dyed, that which they have registered, should not protect themselves as against those who are so manufacturing in the undyed state, and afterwards dyeing their goods so as to pass them off as the goods of the Plaintiffs. No doubt the Master of the Rolls also goes upon this, that the selvage of the Defendants having the triple cord, which is

a distinct trade-mark, could not interfere with any rights of the Plaintiffs, but that, in my opinion, goes on the footing of treating the Act as altering the principles on which the Court is to proceed. Courts of Equity have interfered, and, in my opinion, ought to continue to interfere, in restraining persons from selling their own goods as the goods of others. I have made these observations in order to shew that the question to be decided at the hearing is, whether the Defendants' marks are calculated to deceive purchasers by making them think when they are buying the Defendants' goods that they are buying the goods of the Plaintiffs.

I will say a few words as to the reason why I think we cannot interfere by granting an injunction. If there is a conflict of testimony on the question whether or no goods are calculated to deceive or be passed off as those of the persons by whom they are not manufactured, the Court very often is in a position to judge by its eyes where the truth lies and what ought to be the result. In the present case, however, the question seems to me to be essentially a question for experts, for when the goods are placed side by side there is great difficulty in arriving at a conclusion whether the triple thread used by the Defendants and the selvage altogether is not calculated to deceive. No doubt we must take into consideration the position of this triple thread in the Defendants' goods, not that the Plaintiffs' right is to be treated as confined to a selvage with a thread in the middle, but of course the placing the thread at the side, and where it is less conspicuous, is an element to be considered. Now I do not say that, on the materials before us I should arrive at a conclusion adverse to the Plaintiffs. My impression at the present moment is in their favour. But there is a conflict of testimony between the expert witnesses, and there is, so far as I am concerned, a difficulty in arriving at a satisfactory conclusion, and I think the better course is to let the motion stand to the hearing, and then, after cross-examination of the witnesses, and after hearing the evidence in Court, the Court can decide whether the Defendants' goods are so manufactured as to be calculated to be passed off as the goods of the Plaintiffs. On that ground I think that we ought not to grant any interlocutory injunction, but that the motion should stand over to the hearing, the Defendants being put on an under-

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taking to keep an account. Thus the Plaintiffs at the hearing will not have it thrown in their teeth that their application was refused, or that they did not make an interlocutory application to the Court in order to ascertain as far as they could, and as soon as they could, what their rights were.

THESIGER, L.J.:—

I agree that the motion should stand till the hearing. The Master of the Rolls appears to have thought that he was in a position to decide the matter between the parties without any reference to the voluminous affidavits which have been filed on both sides, and to have decided the matter adversely to the Plaintiffs upon a mere inspection of the exhibits. He appears to have considered that there were three fatal objections to the case put forward by the Plaintiffs. First, that the selvage of the goods as dyed and sold by them was not a white selvage at all, and therefore did not come within the description which, at all events, was a basis of the registered trade-mark; secondly, that the Defendants' threefold mottled thread was a sufficiently distinctive device to distinguish the Defendants' goods from the Plaintiffs' goods with the twofold mottled thread upon them; and, thirdly, that the position of the mottled thread used by the Defendants upon their goods was a sufficient distinction to prevent there being any misleading of purchasers with reference to the Plaintiffs' and the Defendants' goods. With great respect to the Master of the Rolls, I cannot come to the same conclusion merely by looking at the exhibits themselves. In the first place, although the selvage of the dyed goods is not anything approaching to pure white, yet, at the same time I cannot say that it is not such as might reasonably be described by the trade generally, and not merely by the particular manufacturers residing in *Bradford*, as a white selvage. Secondly, although the Defendants are using a mottled thread made up of three distinct colours, instead of a mottled thread made up of two distinct colours, yet I cannot say by the evidence of my own eyes, whether the threefold thread used by the Defendants might not even to the eyes of an expert be a colourable imitation of the twofold thread used by the Plaintiffs. It appears to me that that must be a matter of evi-

dence, and evidence of experts. Thirdly, although no doubt it can at once be seen that the mottled thread used by the Defendants is placed at the very edge of the selvage, while the Plaintiffs' mottled thread is placed nearly in the middle of the selvage, yet I cannot say that that by itself constitutes necessarily such a distinction between the marks used by the Defendants and the marks used by the Plaintiffs that by no possibility could purchasers be deceived. On all these matters I give no opinion as to what ought to be the final decision. All I say is, that these matters cannot and ought not to be dealt with by mere inspection of the exhibits by the Judge. There is clearly a conflict of evidence, and such a conflict of evidence as makes it undesirable that this Court should decide the matter on motion. The matter must ultimately be decided not upon one single point but upon two points, because the evidence is directed to these two matters: First, whether the Defendants' mark is a colourable imitation of the Plaintiffs' registered mark. Secondly, whether the Defendants have been selling goods so marked as to lead purchasers to believe they are the Plaintiffs' goods. On these questions, as I have already said, there is a confiict of testimony, and the decision must ultimately turn upon the conclusion at which the Court before which the matter comes arrives upon that testimony.

Solicitors: *Paterson, Snow, & Bloxam; W. & J. Flower & Nussey.*

C. A.
1880
M. R.
Jan. 19.
C. A.
July 1.

MEGSON *v.* HINDLE.

[1879 M. 2674.]

Will—Illegitimate Children.

A testator gave to "my grandson *J.* (the son of my daughter *Alice Jane*, and who is now residing with me)" the sum of £500, to be paid to him if and when he should attain twenty-one, with power to apply the income in the meantime for his maintenance; but if he died under twenty-one the £500 and the unapplied income was to go in augmentation of the legacy of £2000 "hereinafter bequeathed in favour of the children and issue of my said daughter *Alice Jane*." The testator gave to trustees £2000 to be accumulated till the expiration of twenty-one years, or the death of *Alice Jane*, whichever might first happen, and then directed the fund and its accumulations to be divided amongst all the children of *Alice Jane* who should be then living, and the issue of such of them as should be then dead *per stirpes*. He gave two sums of £2500 upon trust for the children and issue of his two other daughters respectively, corresponding with the trusts of the £2000. The grandson was illegitimate. He attained twenty-one, and survived his mother:—

Held, by the Master of the Rolls, and by the Court of Appeal, that the grandson *J.* was not entitled to participate in the £2000.

JAMES HINDLE, by will, dated the 29th of May, 1868, devised and bequeathed as follows:—

"I bequeath unto my grandson *James* (the son of my daughter *Alice Jane*, and who is now residing with me) the legacy or sum of £500, to be paid to him if and when he shall attain the age of twenty-one years, but with power for my executors to apply the interest arising therefrom in the meantime for or towards his maintenance and education. But in case my said grandson *James* shall die under the age of twenty-one years, then I direct that the said sum of £500 and the unapplied interest thereof shall go in augmentation of the legacy of £2000 hereinafter bequeathed upon trusts in favour of the children and issue of my said daughter *Alice Jane*."

The testator then, after giving pecuniary legacies to two of his sons, and bequeathing his business to one of them, devised certain messuages to his trustees upon trust to pay the clear rents and profits to his said daughter *Alice Jane*, the wife of *William*

Mitchell, during her life, and after her death in trust for all or exclusively for any one or more of the children or remoter issue of his said daughter *Alice Jane* (such remoter issue being born in her lifetime), in such proportions, for such interests, and generally in such manner as she, whether covert or sole, by her will should appoint, and in default of such appointment and subject to any partial appointment, in trust for the child, if only one, or all the children, if more than one, of his said daughter *Alice Jane*, who either before or after her decease should, being a son or sons, attain the age of twenty-one years, or, being a daughter or daughters, should attain that age or marry, such children, if more than one, to take in equal shares, their, his, or her heirs, executors, administrators, or assigns, as tenants in common absolutely, but in the event of the failure of the trusts thereinbefore declared concerning the said premises, upon the trusts thereinafter declared.

The testator then bequeathed to his trustees the sum of £2000 in trust to invest it as therein mentioned, and accumulate the income until the expiration of the period of twenty-one years from the time of his decease, or until the death of his daughter *Alice Jane*, whichever should first happen, which period was thereinafter referred to as the period of distribution, and on the arrival of that period to pay, assign, and transfer the capital and the accumulated income "unto and amongst all the children of my said daughter *Alice Jane* living at the period of distribution, and the issue then living of any of the children of my said daughter *Alice Jane* who may be then dead, in equal shares as tenants in common absolutely, but so that such issue shall take equally amongst them as tenants in common the share or shares only which their parent or parents would have taken if then living. And if there shall be but one such child of my said daughter *Alice Jane*, or the issue of only one such child living at the period of distribution, in trust for and to pay, assign, and transfer the said sum of £2000 and the accumulated income thereof unto such only child or issue absolutely. But in the event of the failure of the trusts lastly hereinbefore declared, upon trust to stand possessed of the said sum of £2000, and the accumulated income thereof in trust as hereinafter expressed."

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The testator then devised certain other messuages to his trustees upon trusts for his daughter *Margaret Shawcross* and her children and issue precisely similar to the above trusts of the messuages given in trust for *Alice Jane* and her issue, and bequeathed to his trustees the sum of £2500 upon trusts for the children and issue of *Margaret Shawcross* precisely corresponding to the trusts of the £2000 in favour of the children of *Alice Jane*. There was a similar gift of certain messuages upon corresponding trusts in favour of his daughter *Sarah Brierly* and her issue, and a gift of £2500 upon trusts for the children and issue of *Sarah Brierly* precisely corresponding to the trusts of the £2000 in favour of the children and issue of *Alice Jane*.

The testator then declared that in the event of the failure of the trusts thereinbefore declared concerning the trust premises in which his said three daughters, or any or either of them, took a life interest, the trust premises whereof the trusts should so fail should be held in trust for such person or persons as at the time of the failure of the same trusts respectively should be his next of kin, and who, under the statutes for the distribution of the effects of intestates, would have become entitled thereto as part of his personal estate in case he had then died intestate, and so that such persons, if more than one, should take as tenants in common in the shares in which they would have taken under the same statutes. And he declared that in the event of the failure of the trusts thereinbefore declared concerning the trust funds and the accumulated income thereof thereinbefore bequeathed for the benefit of the children and issue of his said three daughters, or any or either of them, the trust fund and accumulated income whereof the trusts should so fail should thereupon go and be held in trust for such person or persons as at the time of the failure of the same trusts respectively should be his next of kin, and who under the statutes for the distribution of the effects of intestates would have become entitled thereto as part of his personal estate if he had then died intestate, and so that such persons, if more than one, should take as tenants in common in the shares in which they would have taken under the same statutes.

The testator died in June, 1868. His daughter *Alice Jane* died on the 5th of May, 1876. She had seven children, one of whom,

the testator's grandson *James* named in his will, was illegitimate, having been born before her marriage.

James Mitchell attained twenty-one in June, 1872, and shortly afterwards received his legacy of £500.

In 1877 *James Mitchell* transferred to the Plaintiff all his interest in the messuages devised in trust for *Alice Jane* and her children and issue, and in the legacy of £2000, and this action was brought to establish the Plaintiff's title to a share in those properties.

The action was tried before the Master of the Rolls on the 19th of January, 1880.

Davey, Q.C., and *H. H. Humphreys*, for the Plaintiff, argued that the testator intended to include the illegitimate child in the legacy. They cited *Crook* v. *Hill* (1); *Wilkinson* v. *Adam* (2); *Ellis* v. *Houstoun* (3); *Gill* v. *Shelley* (4); *Dorin* v. *Dorin* (5).

Chitty, Q.C., and *A. T. Watson*, *contrà*, contended that the illegitimate child must be excluded, as legitimate and illegitimate children could not take under one description: *Bagley* v. *Mollard* (6).

Humphreys, in reply.

JESSEL, M.R.:—

I have no doubt as to the decision I ought to arrive at in this case, for *Bagley* v. *Mollard* is an authority precisely in point. *Crook* v. *Hill* is distinguishable, because the children there were the issue of a marriage which the testator thought was a lawful one, though it was in fact unlawful.

In *Bagley* v. *Mollard* the gift was to the testator's grandchild, whom he described as "my grandchild, *Elizabeth Mollard*, the now only surviving child of my son, *William Mollard*;" and so she was, because the testator's son, *William*, had had two legitimate children, who had died, leaving *Elizabeth*, who was an illegitimate

(1) Law Rep. 6 Ch. 311; Ibid. 6 H. L. 265.
(2) 1 V. & B. 422.
(3) 10 Ch. D. 236.
(4) 2 Russ. & My. 336.
(5) Law Rep. 7 H. L. 568.
(6) 1 Russ. & My. 581.

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child, surviving; therefore the testator clearly meant by "surviving child" this illegitimate child. Then the testator proceeded to give all the residue of his property, after the death of his wife and daughter, to "all and every the children" of his sons *James* and *William*, and of his daughter *Mary*, as tenants in common. At the date of the will *William's* two legitimate children were dead: but yet it was held that the illegitimate child, *Elizabeth*, did not take a share of the residue under the gift to "children," on the ground that whenever the general description of children would include legitimate children, it could not be extended to illegitimate children.

That case, therefore, is a much stronger case than this, because the testator had previously described *Elizabeth* as the then only surviving child. What the Master of the Rolls said is this: [His Lordship then read the whole of the judgment at p. 586, and continued:—] Then it may be said that, according to that decision, illegitimate children can never take with legitimate children under the same description or class, whereas the House of Lords has decided that they can. But that is not so, because in *Crook* v. *Hill* (1) what the Lords said is that the word "children" *primâ facie* means legitimate children, though it is possible that in a particular case it may include illegitimate children: that is all. For instance, if a testator has said, "I intend by the word 'children' to include illegitimate children," there is nothing to prevent illegitimate children from taking: that is all the House of Lords meant.

Now, what is the gift here? The testator first of all bequeaths a legacy of £500 "unto my grandson *James* (the son of my daughter *Alice Jane*, and who is now residing with me.)" There, no doubt, the testator clearly recognises *James* as his grandchild; but then we find a subsequent gift of a legacy of £2000 simply to "the children of my said daughter *Alice Jane*." According to the decision of the House of Lords the word "children" without a context means legitimate children. If that is so—if the gift to "children" includes only legitimate children—where is the context here to take it away from them? The testator does not say in the previous gift to his grandson *James*, that *James* is to be treated for all the purposes of his will as his legitimate grandchild; he

(1) Law Rep. 6 Ch. 311; Ibid. 6 H. L. 265.

simply describes him in the previous gift as "my grandson *James*." He was no doubt his grandson by nature; he knew he was illegitimate. Then, the daughter having other children who were legitimate, why should I go out of my way to say that her illegitimate son is to take? That son has a separate provision made for him. Why should I say that there is a necessary inference, not a mere probability, that the testator intended him to participate in the other gift?

If it had not been for the case of *Crook* v. *Hill* (1), the present case would not have been capable of argument, but, looking at what was really decided in *Crook* v. *Hill*, I hold that this gift to the "children" of the testator's daughter includes legitimate children only.

The Plaintiff appealed from this decision. The appeal was heard on the 1st of July. C. A.

Davey, Q.C., and *H. H. Humphreys*, for the Appellant:—

The Master of the Rolls relied upon *Bagley* v. *Mollard* (2), but that case is not now law, for it went upon the exploded rule that legitimate and illegitimate children cannot take under the same gift. Sir *John Leach* considered the case to be governed by *Wilkinson* v. *Adam* (3), in which case illegitimate children took, though Lord *Eldon* felt great doubt whether they could have taken if there had been any legitimate children. *Occleston* v. *Fullalove* (4) shews the inclination of the Courts to treat illegitimate children less harshly than formerly. The remarks in *Owen* v. *Bryant* (5) shew that there is no inflexible rule that legitimate and illegitimate children cannot take together, and Lord Justice *Knight Bruce* clearly did not approve of *Bagley* v. *Mollard*. In *Crook* v. *Hill* all the cases were reviewed, and it was laid down that there is no rule that existing illegitimate children cannot take under a gift to "children" if there is a context to shew that it was intended. The only question then is whether the testator

(1) Law Rep. 6 Ch. 311; Ibid. 6 H. L. 265.
(2) 1 Russ. & My. 581.
(3) 1 V. & B. 422, 462, 466.
(4) Law Rep. 9 Ch. 147.
(5) 2 D. M. & G. 697.

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has made a dictionary in his will shewing that the child in question was included in the term "children." We say that as the testator has by his will recognised this child as his grandchild, and son of his daughter *Alice Jane*, he must be treated as legitimate for all the purposes of the will. This boy had lived with and been maintained by the testator, he no doubt was a favourite, and as the testator had maintained him, he gives a legacy to provide for his maintenance. He intended him to have this in addition to his share. In *Ellis* v. *Houstoun* (1) Vice-Chancellor *Malins* says, "If a testator says in his will 'I give a legacy to my son *A.* and afterwards to his children,' and *A.* is illegitimate, is *A.* to take under a general bequest to children? Certainly, because the testator having called him a child in one part of the will, he is to be treated as such in another part of the will. In that case the will itself would enable the Court to give it to that illegitimate child." In *Dorin* v. *Dorin* (2) illegitimate children were held not to take, but there was no context under which they could be brought in. The cases of *Meredith* v. *Farr* (3) and *Evans* v. *Davies* (4) are very similar to the present, and are in our favour.

Chitty, Q.C., *A. T. Watson*, and *Grosvenor Woods*, for the Respondents:—

We do not dispute that illegitimate children may take under a gift to children if the testator has sufficiently shewn an intention to that effect, but we contend that the testator's merely calling an illegitimate grandson his grandson, and the son of his daughter in the earlier part of the will, does not import that he is to be taken as a legitimate child for all the purposes of the will. It is to be observed that the testator gives £2500 to the issue of each of his other two daughters, but he gives £500 to *James Mitchell* and £2000 to the issue of *Alice Jane*, which indicates an intention that *Alice Jane's* children, legitimate and illegitimate together, should have the same amount as the issue of the other daughters. If *James Mitchell* dies under twenty-one, his legacy is to be added to the £2000 bequeathed in favour of "the children and issue," not "the other children and issue" of *Alice Jane*. When we come to

(1) 10 Ch. D. 236, 244.
(2) Law Rep. 17 Eq. 463; Ibid. 7 H. L. 568.
(3) 2 Y. & C. Ch. 525.
(4) 7 Hare, 498.

the gifts over to the next of kin, there is no pretence for saying that the testator has supplied any interpretation clause which would enable *James Mitchell* to participate as one of the next of kin. The original gift to *James* is expressed in terms which shew that the fact of his illegitimacy was present to the testator's mind, and there is not enough on the will to raise that necessary implication which is required to rebut the presumption that "children" means legitimate children.

[They were then stopped by the Court.]

Davey, in reply.

JAMES, L.J.:—

I do not see my way to differ from the Master of the Rolls. The testator makes a special and distinct provision for *James Mitchell*, which appears to me inconsistent with an intention to include him in the general gift to *Alice Jane's* children. If I were asked what the testator really meant, I should say that he did not intend to include *James Mitchell* in the gifts to *Alice Jane's* children; and that being so, it is impossible for me to come to the conclusion that there is such a context as to take the case out of the rule that "children" *primâ facie* means legitimate children.

COTTON, L.J.:—

To take a case out of the common rule that only legitimate children can take under a gift to "children," there must be on the face of the will such a strong probability of the testator's intending to include illegitimate children, that a contrary intention cannot be imputed to him. Now it struck me at first as improbable that the testator intended to include *James Mitchell* in the gift to children, when he makes a separate provision for him which on his death under twenty-one is to fall into the £2000 given to the children. Still, if a necessary inference that he was to take as a child can be collected from the will, he ought not to be excluded. It is said that such an implication is furnished by the fact that the testator describes him as a son of *Alice Jane*. But the testator does not refer to him in the same terms as the other

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children: he speaks of him as "my grandson *James*, son of my daughter," a mode of description which would be more natural in the case of an illegitimate than of a legitimate child. *Hill* v. *Crook* (1) is the only case in which illegitimate children who had not been described as children were allowed to take; but in that case the parents were spoken of as husband and wife, and it was a necessary inference that the testator intended their children to take though the marriage was invalid. In all the other cases in which illegitimate children have taken, they have been referred to as children, or there have been circumstances shewing that the gift could not have been intended for legitimate children. Here we have nothing but the fact that *James Mitchell* has been mentioned as a grandson of the testator and a son of *Alice Jane*. And I think that is not enough, especially when we observe that the testator has made a separate provision for him.

THESIGER L.J.:—

I am of the same opinion. In order to enable illegitimate children to take under a gift to children, there must be a plain and clear inference from the terms of the will leaving no doubt that they were intended to take: and I cannot find such plain and clear inference in this case.

Solicitors: *Johnson & Weatherall; Milne, Riddle, & Mellor.*

(1) Law Rep. 6 H. L. 265.

Ex parte ROGERS. *In re* ROGERS.

C. A. 1880 July 8.

Bankruptcy Petition—Proof of Act of Bankruptcy—Service of Debtor's Summons—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 8—*Bankruptcy Rules*, 1870, *r.* 38—*Illegal Contract—Wagering Transaction—"Differences" on Stock Exchange—Broker and Principal.*

A debtor's summons and a bankruptcy petition founded upon the non-compliance with it, are entirely distinct litigations, and the evidence taken upon the one cannot be used upon the other unless previous notice has been given of the intention to use it.

Therefore, upon the hearing of a bankruptcy petition founded upon the debtor's non-compliance with a debtor's summons the service of the summons must be strictly proved, even though the debtor has, in an affidavit previously made by him upon an application to dismiss the summons, admitted that the summons has been served upon him.

Such an affidavit cannot be used upon the hearing of the petition, unless previous notice has been given of the intention to use it.

Where a person desiring to speculate on the *Stock Exchange* has instructed a broker to buy and sell stocks for him, with the intention that he should only receive or pay "differences," and has authorized the broker to pay any losses for him, the broker is entitled to recover any sums which he has so paid for the principal, even though he has not entered into separate contracts on his behalf, but has appropriated to him parts of larger amounts of stock which he (the broker) has bought as a principal with the view of dividing them among different clients for whom he has been instructed to buy.

Robinson v. *Mollett* (1) distinguished.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

On the 13th of April, 1880, *C. F. Evans*, a stock and share-broker in the city of *London*, issued a debtor's summons against *William Rogers*, a non-trader, for £725 6*s.* 1*d.* The particulars of demand stated that this amount was the balance of money due and owing to *Evans* from *Rogers* on the purchase and sale of sundry stocks and shares made by *Evans* at his request in the month of February, 1880, and for commission payable to *Evans* thereon, and for money paid by him for carrying over a portion of the said stocks and shares at the request of *Rogers*, the full parti-

(1) Law Rep. 7 H. L. 802.

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culars of which had been delivered to him. The summons was served on *Rogers* on the 15th of April, 1880. *Rogers* applied to the Court to dismiss the summons, and in an affidavit which he made in support of his application he stated that the summons had been served upon him. An affidavit of the service of the summons was made by a clerk of *Evans'* solicitors, who had actually served the summons. These affidavits were filed in the Court, and were used upon the hearing of the application to dismiss the summons. On the 14th of May the application was dismissed. *Rogers* failed to comply with the requirements of the debtor's summons, and on the 3rd of June *Evans* presented a bankruptcy petition against him, alleging the above debt of £725 6*s.* 1*d.*, and alleging, as an act of bankruptcy, the failure to comply with the debtor's summons. Before the sealing of the petition the ordinary affidavit (Bankruptcy Forms, 1870, No. 11) was made by *Evans* of the truth of the statements in the petition. The petition was served on *Rogers* on the 5th of June, and on the 10th of June he gave notice of his intention at the hearing to dispute the petitioning creditor's debt and the act of bankruptcy. At the hearing of the petition the counsel for *Rogers* objected that there was no evidence of the service of the debtor's summons. The only evidence (other than that which was already on the files of the Court in the matter of the debtor's summons) was the affidavit of *Evans* verifying the truth of the statements in the petition. No notice had been given that the affidavits made in the matter of the summons would be used on the hearing of the petition. It was also objected that there was not a good petitioning creditor's debt. *Evans* had made an affidavit of the amount due to him in terms similar to those of the particulars of demand. He was examined before the Registrar, and from his evidence it appeared that he was instructed by *Rogers* to buy and sell stocks and shares for him on the *London Stock Exchange.* The contracts were made for the next account day, and were expressly made subject to the rules and regulations of the *Stock Exchange,* by virtue of which *Evans* was a principal, as between himself and the jobbers with whom he dealt, and was liable to pay differences to them if there was a loss on the transactions, and if on the account day the jobber refused to carry over the transaction to the next

account day, he could compel *Evans* to take delivery of the stock. If he did not do this he would be declared a defaulter on the *Stock Exchange*. It was understood between *Evans* and *Rogers* that the latter was only speculating for the rise of the stocks which he bought, and that he never intended to accept delivery of them, but meant to sell them again before the account day and to receive or to pay the difference between the prices at which he bought and sold. On the 26th of February, 1880, an account was rendered by *Evans* to *Rogers* shewing that a balance of £2275 would be due from him on the following day, which was the account day. On the 27th of February *Rogers* went to *Evans'* office just before four o'clock in the afternoon, and gave him notes for £1050. *Evans* told him that he should have to pay the jobbers that afternoon or he would be declared a defaulter the next day. *Rogers* said he would let him have the rest of the money the next day, and he told *Evans* to get the money where he could. *Evans* accordingly borrowed the necessary sum from some friends and paid the jobbers. *Rogers* afterwards paid him £500. *Evans* was asked whether it was not his practice when two clients wished to buy the same kind of stock to enter into one contract with a jobber for the whole amount. He admitted that he sometimes did this, but he could not say certainly whether it had ever been done in respect of any of his transactions for *Rogers*, but he said he thought that those transactions were all separate.

The Registrar held upon the authority of *Thacker* v. *Hardy* (1) that there was a good petitioning creditor's debt, and said that he should make the adjudication subject to formal proof being given of the act of bankruptcy. An affidavit was afterwards filed by *Evans*, in which he said that he had caused to be served on *Rogers* a debtor's summons for a sum of not less than £50, and that *Rogers* had for the space of three weeks after the service neglected to pay such sum or to secure or compound for the same. He said also that *Rogers* applied to the Court to dismiss the summons, and that the application was on the 14th of May dismissed. Upon this affidavit being produced the Registrar signed the order of adjudication.

Rogers appealed.

(1) 4 Q. B. D. 685.

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A. Beddall, for the Appellant:—

There is no sufficient evidence of the commission of any act of bankruptcy. It is necessary to prove the act of bankruptcy on the hearing of the petition: *Bankruptcy Act*, 1869, s. 8; *Bankruptcy Rules*, 1870, r. 38; *Ex parte Dodd* (1); *Ex parte Lindsay* (2). The practice as to adjudications of bankruptcy must be strictly followed: *Ex parte Coates* (3). The affidavit which was produced at the hearing by the Registrar does not prove the service of the debtor's summons, and there was no other evidence of that service filed in the proceedings under the petition.

Moreover, there is not a good petitioning creditor's debt. The case is not like *Thacker* v. *Hardy* (4). The debt arises out of a gambling or wagering transaction, and is illegal. The evidence shews that the petitioner was instructed to act as a broker, but that he really was a seller. He entered into contracts for the purchase of larger sums of stock than those which the Plaintiff had instructed him to buy, and then contracted to sell a part of what he had so bought to the Plaintiff. He was really a principal, not a broker, and consequently *Robinson* v. *Mollett* (5) applies, and the contracts were not binding on the Appellant. The Petitioner's conduct may have been in accordance with the custom of the *Stock Exchange*, but it is a custom so inconsistent with the relation of principal and broker as not to bind a principal who acted in ignorance of it.

[JAMES, L.J.:—*Robinson* v. *Mollett* seems only to shew that a man who is employed as a broker cannot execute his commission by selling his own goods to his principal. What proof is there here that the broker sold his own stocks?]

He is bound to prove affirmatively that he actually entered into a contract such as he was authorized by *Rogers* to enter into. He was not authorized to include what he bought for *Rogers* in one contract with purchases for other clients. He admits that he might have done this, and can only say that he thinks the purchases for *Rogers* were made separately. When the account was rendered to *Rogers* there was no good debt existing.

(1) 3 Ch. D. 452.
(2) Law Rep. 19 Eq. 52.
(3) 5 Ch. D. 979.
(4) 4 Q. B. D. 685.
(5) Law Rep. 7 H. L. 802.

[JAMES, L.J. :—There is really abundant evidence of the debt. He says that *Rogers* authorized him to pay the very sums of money. The point is not arguable.]

Winslow, Q.C., and *J. E. Linklater*, for the petitioning creditor, were called upon only as to the evidence of the service of the debtor's summons :—

Upon the Appellant's application to dismiss the summons, an affidavit of the service was made by the person who served it, and the Appellant, in his own affidavit in support of his application to dismiss, admitted that the summons had been served on him. Rule 38 does not mean that it is necessary to prove over again that of which there is already evidence on the file of the Court.

The bankruptcy petition and the debtor's summons are really all one proceeding; the object of the summons is simply to compel the debtor to commit an act of bankruptcy in order to found a bankruptcy petition on it.

[JAMES, L.J. :—You had not given any notice of your intention to read the evidence taken on the application to dismiss the summons on the hearing of the petition.]

This objection ought to have been taken in the first instance: *Ex parte Lowenthal* (1).

[JAMES, L.J. :—The only question is whether the Petitioner ought to be allowed now to use the evidence on the application to dismiss the summons as new evidence on the petition.]

Beddall, in reply :—

I relied on this technical objection before the Registrar. But for that I should have adduced further evidence as to the debt. If the Petitioner is allowed now to adduce new evidence the Appellant ought also to have an opportunity of adducing further evidence. But the Petitioner chose to take the adjudication on the evidence as it then stood, and he is not entitled now to make a new case.

JAMES, L.J. :—

It appears to me that the objection, which is an entirely tech-

(1) Law Rep. 9 Ch. 591.

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nical one, must prevail to a certain extent. Under the Act and the Rules it is obligatory to prove on the hearing of the petition the act required to sustain the petition, *i.e.* the act of bankruptcy, as well as the petitioning creditor's debt. In the present case the debt appears to me to be proved beyond all reasonable question. There is no ground whatever for the contention that the case has anything to do with *Robinson* v. *Mollett* (1), where a broker was selling his own goods to his principal. This is the ordinary common case of a broker employed by a person who is speculating on the *Stock Exchange,* and authorized by his client to pay his losses, and actually paying them. The petitioning creditor's debt is not open to question of any kind. But, with regard to the other objection, I think the Registrar has allowed a slip to be made. The respondent to a bankruptcy petition founded on a debtor's summons is entitled to have the act of bankruptcy strictly proved, by proving the service of the summons and the non-payment of the debt after service. That the summons had been served in the present case is beyond all question, if we are at liberty to look at what took place before the presentation of the petition. There is not only the affidavit of the person who served the summons, but there is the admission of the debtor himself that the summons was served on him. But, in my opinion, the proceedings on the debtor's summons are a wholly distinct litigation from the proceedings on the petition, and I cannot accept the proposition that the one is so connected with the other that the evidence taken in the one can be used as a matter of course in the other. The one is a proceeding to compel a man to commit an act of bankruptcy; the other is a proceeding to make him a bankrupt. The two are to my mind as distinct as if the one had been an action at law, and the other a petition for adjudication. The evidence on the summons is strictly not evidence on the petition, no notice having been given of any intention to use it. The Registrar ought to have adjourned the hearing of the petition, to enable the Petitioner to adduce evidence of the service of the summons, and I think that is the course which ought to be taken now. And we cannot refuse to allow the debtor to adduce the evidence as to the debt which his counsel tells us he would have adduced if he had not relied on

(1) Law Rep. 7 H. L. 802.

his technical objection. The order of adjudication must be discharged, and the petition must be remitted to the Registrar to hear further evidence as to the service of the debtor's summons, with liberty to the debtor to adduce further evidence in opposition to the debt, if he shall be so advised. The costs of the appeal will be reserved to be dealt with by the Registrar.

BRETT, L.J.:—

I am sorry to say that the captious objection which has been taken must prevail. It seems to me that rule 38 renders it necessary that the act of bankruptcy should be proved again on the hearing of the petition, *i.e.* proved by fresh evidence which is evidence on that proceeding. It seems to me that the evidence on the former proceeding cannot be used unless something is done to make it evidence on the new proceeding. If notice had been given that the affidavit of the debtor on the application to dismiss the summons would be used, that would have made it evidence in the new proceeding, and if it had been used it would have thrown on him the burden of proving that the admission contained in it was not correct. But there was in fact no legal evidence before the Registrar to prove the service of the summons. But the objection was really a surprise, looking at what had happened previously; no reasonable person would have expected it to be taken. The Appellant had however a legal right to take it, and as it is pressed we are bound to allow it. The case must go back to the Registrar, and as we are told by counsel at the Bar that, relying on this objection, he was not prepared with further evidence against the validity of the debt, he must have an opportunity of adducing that evidence.

COTTON, L.J.:—

It is impossible not to regret that this objection has been taken, because there can be no reasonable doubt that an act of bankruptcy has been committed. But the rule requires that the act of bankruptcy should be proved at the hearing of the petition, and, in my opinion, that has not been done in the present case. The question is what ought to be done now. But for the state-

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ment of the Appellant's counsel, I should say that this Court ought now to correct the slip by allowing further evidence of the service of the summons to be adduced on the appeal, and then to make the order which should have been made by the Registrar on that evidence. But, under the circumstances, I think the proper course is to send the case back to the Registrar in the way which has been already suggested by Lord Justice *James*.

With regard to the validity of the petitioning creditor's debt I must express my concurrence in what the Lord Justice has said, that so far as the point of law is concerned it must be taken to be concluded by *Thacker* v. *Hardy* (1). The debt is in respect of sums of money paid by the Petitioner for the Appellant at his request. The point which arose in *Robinson* v. *Mollett* (2) does not arise. The Appellant expressly requested the Petitioner to pay the money.

BRETT, L.J.:—

I wish to add that *Robinson* v. *Mollett* has nothing in the world to do with the present case. The question there was as to the validity of a custom in a particular market. The present case is the ordinary case of money paid by one man at the request of another.

Solicitor for Appellant: *W. Rogers.*
Solicitors for Respondent: *Travers Smith & Braithwaite.*

(1) 4 Q. B. D. 685. (2) Law Rep. 7 H. L. 802.

TAMPLIN *v.* JAMES.

C. A.
1879
BAGGALLAY, L.J.
For V.-C. M.
March 17, 18, 20.
C. A.
1880
July 12, 13.

[1878 T. 19.]

Mistake—Specific Performance—Damages.

Property was put up for sale under the description of "All that inn with the brewhouse, outbuildings, and premises known as *The Ship*, together with the saddler's shop and premises adjoining thereto, situate at *N.*, Nos. 454 and 455 on the tithe map, and containing by admeasurement twenty perches more or less." In the sale-room were plans of the property, which consisted of the closes numbered 454 and 455 on the tithe map. At the back of the property were two pieces of garden ground containing together about twenty perches, not belonging to the vendors, one of which had for many years been occupied with the inn and the other with the saddler's shop, and which were hardly at all fenced off from the premises with which they were occupied. The Defendant, who was acquainted with the property and knew that the gardens were occupied along with the inn and saddler's shop, did not look at the plans, and bought in the belief that he was buying the whole of the property in the occupation of the tenants:—

Held, by *Baggallay*, L.J., sitting for *Malins*, V.C., and by the Court of Appeal, that the purchaser could not resist specific performance on the ground of mistake.

Where specific performance is refused on the ground of mistake by the Defendant, so that under the old practice a bill for specific performance would have been dismissed without prejudice to an action, the Court will proceed to consider the question of damages.

THIS was an action by vendors for specific performance.

On the 25th of July the Plaintiffs, who were the trustees of a will, put up certain parts of their testator's property for sale in lots. Lot 1 was described as follows:—

"All that well-accustomed inn, with the brewhouse, outbuildings, and premises known as *The Ship*, together with the messuage, saddler's shop, and premises adjoining thereto, situate at *Newerne*, in the same parish, No. 454 and 455 on the said tithe map, and containing by admeasurement twenty perches, more or less, now in the occupation of Mrs. *Knowles* and Mr. *S. Merrick*.

"This lot is situate close to the *Lydney Town* station, on the *Severn and Wye Railway*, and abuts on other premises of the vendors, on the canal, and on lands now or late of the Rev. *W. H. Bathurst*."

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Lot 1 was not sold at the auction, but immediately afterwards the Defendant, who had been present at the auction, made an offer for it which was accepted, and signed a contract for purchase according to the conditions of sale at the price of £750.

At the back of Lot 1, and of the house adjoining it, lay three plots of garden ground, which had formerly belonged to the Rev. *W. H. Bathurst*, but had since been purchased by the railway company. One of these pieces of ground was in the occupation of the tenant of the messuage and saddler's shop, and the other in the occupation of the tenant of *The Ship Inn*. The tenants each held his house and the garden ground at one rent, which was paid to the vendors' agent, who accounted to the owners of the garden ground for their proportions of the rent. The origin of this arrangement, which had been acted upon for many years, did not appear. The rent paid for the gardens was 10*s.* a year each. Each of these two pieces, which together contained about twenty perches, was partially divided by a fence from the premises with which it was occupied, but there was no boundary of such a nature as to suggest that it belonged to a different owner.

It appeared that at the auction two plans of Lot 1 were lying on the table, and the auctioneer called the attention of the persons present to them. One of them was a tracing from the tithe map, the other was a tracing on a much larger scale from a map belonging to the railway company. On this latter plan the pieces of garden ground were marked as belonging to the railway company, and in each plan the property forming Lot 1 was coloured, so as to distinguish it from the adjoining property. It was correctly described as being 454 and 455 on the tithe map, and included the whole of the closes so numbered.

The Defendant deposed that he had not seen the plans, and was not aware of there being any plans in the room; that he had known the property from a boy, and knew that the two plots of garden ground had all along been occupied with *The Ship Inn* and the saddler's shop respectively; and that he bought in the full belief that he was buying all that was in the occupation of the tenants, and he declined to complete unless the gardens were conveyed to him.

The hearing took place before Lord Justice *Baggallay*, in consequence of the illness of Vice-Chancellor *Malins*, on the 17th and 18th of March, 1879.

J. Pearson, Q.C., and *Cozens-Hardy*, for the Plaintiffs.

Higgins, Q.C., and *W. Barber*, for the Defendant.

1879. March 20. BAGGALLAY, L.J., after stating the leading facts, continued:—

The Defendant insists in his statement of defence that he signed the memorandum in the reasonable belief that the property comprised therein included the whole of the premises in the occupation of Mrs. *Knowles* and of Mr. *Samuel Merrick*, and not merely the messuages and hereditaments which the Plaintiffs allege to be the only property comprised therein, and that such his belief was induced and confirmed by the acts and words of the auctioneer at the sale. The Defendant has sworn positively that he had such a belief at the time he signed the memorandum, and I see no reason to doubt the statement so made by him; but was such a belief a reasonable belief?

It is doubtless well established that a Court of Equity will refuse specific performance of an agreement when the Defendant has entered into it under a mistake, and where injustice would be done to him were performance to be enforced. The most common instances of such refusal on the ground of mistake are cases in which there has been some unintentional misrepresentation on the part of the Plaintiff (I am not now referring to cases of intentional misrepresentation which would fall rather under the category of fraud), or where from the ambiguity of the agreement different meanings have been given to it by the different parties. The case of *Manser* v. *Back* (1) is a well-known illustration of this. It is true also that specific performance has been refused in cases not coming under either of these heads, as in *Malins* v. *Freeman* (2). But where there has been no misrepresentation, and where there is no ambiguity in the terms of the contract, the Defendant cannot be allowed to evade the performance of it by the simple statement

(1) 6 Hare, 443. (2) 2 Keen, 25.

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that he has made a mistake. Were such to be the law the performance of a contract could rarely be enforced upon an unwilling party who was also unscrupulous. I think that the law is correctly stated by Lord *Romilly* in *Swaisland* v. *Dearsley* (1): "The principle on which the Court proceeds in cases of mistake is this—if it appears upon the evidence that there was in the description of the property a matter on which a person might *bonâ fide* make a mistake, and he swears positively that he did make such mistake, and his evidence is not disproved, this Court cannot enforce the specific performance against him. If there appears on the particulars no ground for the mistake, if no man with his senses about him could have misapprehended the character of the parcels, then I do not think it is sufficient for the purchaser to swear that he made a mistake, or that he did not understand what he was about." The observations of Vice-Chancellor *Wigram* in *Manser* v. *Back* (2) seem to me to tend in the same direction.

Now does it appear, or can it safely be held in this case that the Defendant reasonably entertained a belief that the gardens were included in the property purchased by him? I will consider first the terms of the contract itself, and then the allegations as to the acts and words of the auctioneer and other agents of the Plaintiffs, for it is possible that although the terms of the agreement taken *per se* may have been free from doubt, enough may have been said or done by the Plaintiffs' agents to lead the Defendant to attribute a different meaning to its terms.

Mr. *Pearson* admitted, and I think he could not well have avoided admitting, that if the vendors had merely referred to the property as being in the occupation of Mrs. *Knowles* and Mr. *Merrick* without more, there would have been at any rate such an amount of ambiguity that the Defendant might reasonably have understood that he was purchasing the whole of the property in their occupation. But the particulars go on to state that the property sold is Nos. 454 and 455 on the tithe map and contains twenty perches. The additional land which the Defendant claims to have included is about twenty perches more. Therefore, if he is right in his contention, he would be entitled to double the amount which the printed particulars state the lot to contain.

(1) 29 Beav. 430, 433. (2) 6 Hare, 443, 448.

There, no doubt, is force in the argument that a person unaccustomed to measuring would not know whether a property contained twenty perches or forty perches, but that does not get rid of the effect of the reference to the tithe map. The Defendant appears to have purchased in reliance upon his knowledge of the occupation of the premises without looking at the plans, and probably without paying any attention to the details of the particulars of Lot 1, but is a person justified in relying upon knowledge of that kind when he has the means of ascertaining what he buys? I think not. I think that he is not entitled to say to any effectual purpose that he was under a mistake, when he did not think it worth while to read the particulars and look at the plans. If that were to be allowed, a person might always escape from completing a contract by swearing that he was mistaken as to what he bought, and great temptation to perjury would be offered. Here the description of the property is accurate and free from ambiguity, and the case is wholly unaffected by *Manser* v. *Back* (1) and the other cases in which the Defendant has escaped from performance of a contract on the ground of its ambiguity.

[His Lordship then entered into an examination of what passed at the sale, and stated his reasons for coming to the conclusion that nothing had been said or done by the vendors' agents which could lead the purchaser to misconstrue the particulars.]

A decree for specific performance was therefore made.

From this decision the Defendant appealed. The appeal came on to be heard on the 12th of July, 1880.

Higgins, Q.C., and *W. Barber*, for the Appellant:—

The Court will not enforce specific performance where there is a clear mistake on the part of the Defendant, even though the Plaintiff is in no way responsible for it: *Fry* on Specific Performance (2); *Wycombe Railway Company* v. *Donnington Hospital* (3); *Malins* v. *Freeman* (4).

[BRETT, L.J.:—If the Defendant relied on his knowledge of the

(1) 6 Hare, 443.
(2) Page 214.
(3) Law Rep. 1 Ch. 268.
(4) 2 Keen, 25.

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property and misled himself without any fault of the vendors, can he be let off?]

Yes; the other party need not have contributed to the mistake: *Webster* v. *Cecil* (1).

[JAMES, L.J.:—Do you say that if a purchaser says, "I thought the property contained 100 acres and it only contains eighty," he must be let off?]

No; a reasonable ground for mistake must be shewn. Here the vendors framed their description in such a way that the purchaser might reasonably suppose that he was buying all that was in the occupation of the tenants, there being no visible boundary. They ought to have stated that other property was comprised in the holdings for which rent was paid to some one else. This is much more misleading than anything in *Denny* v. *Hancock* (2); *Weston* v. *Bird* (3), *Neap* v. *Abbott* (4), or *Moxey* v. *Bigwood* (5), in all which cases specific performance was refused. The Defendant was not bound to look at the plans, and his not looking at them does not fix him with notice of what he might have learnt by doing so. The action ought to be dismissed.

J. Pearson, Q.C., and *Cozens-Hardy*, *contrà*, were not called upon.

JAMES, L.J.:—

In my opinion, the order under appeal is right. The vendors did nothing tending to mislead. In the particulars of sale they described the property as consisting of Nos. 454 and 455 on the tithe map, and this was quite correct. The purchaser says that the tithe map is on so small a scale as not to give sufficient information, but he never looked at it. He must be presumed to have looked at it, and at the particulars of sale. He says he knew the property, and was aware that the gardens were held with the other property in the occupation of the tenants, and he came to the conclusion that what was offered for sale was the

(1) 30 Beav. 62.
(2) Law Rep. 6 Ch. 1.
(3) 2 W. R. 145.
(4) C. P. Coop. 333.
(5) 8 Jur. (N.S.) 803; S. C. 10 Jur. (N.S.) 597, in D. P.

whole of what was in the occupation of the tenants, but he asked no question about it. If a man will not take reasonable care to ascertain what he is buying, he must take the consequences. The defence on the ground of mistake cannot be sustained. It is not enough for a purchaser to swear, "I thought the farm sold contained twelve fields which I knew, and I find it does not inlude them all," or, "I thought it contained 100 acres and it only contains eighty." It would open the door to fraud if such a defence was to be allowed. Perhaps some of the cases on this subject go too far, but for the most part the cases where a Defendant has escaped on the ground of a mistake not contributed to by the Plaintiff, have been cases where a hardship amounting to injustice would have been inflicted upon him by holding him to his bargain, and it was unreasonable to hold him to it. *Webster* v. *Cecil* (1) is a good instance of that, being a case where a person snapped at an offer which he must have perfectly well-known to be made by mistake, and the only fault I find with the case is that, in my opinion, the bill ought to have been dismissed with costs. It is said that it is hard to hold a man to a bargain entered into under a mistake, but we must consider the hardship on the other side. Here are trustees realizing their testator's estate, and the reckless conduct of the Defendant may have prevented their selling to somebody else. If a man makes a mistake of this kind without any reasonable excuse he ought to be held to his bargain.

BRETT, L.J.:—

It would be dangerous to attempt an exhaustive definition of the cases in which the Court will refuse specific performance. The jurisdiction is a delicate one, and the more so since the fusion of Law and Equity, for if the Court refuses specific performance it must now, in my opinion, consider the question of damages. Here the property was put up for sale by a description which could not mislead anybody who took reasonable care, for it is defined by reference to the numbers on the tithe map, what follows being only a further description of what is included in the two specified closes on the tithe map. According to the finding of Lord Justice

(1) 30 Beav. 62.

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Baggallay the Defendant bought under a mistake, but it was a mistake into which he was led solely by his not taking reasonable care. The Defendant therefore has to support the proposition that although there is nothing misleading in the particulars, and his mistake was not on a point of vital importance, and arose entirely from his own negligence, he is to be relieved. I think that such a proposition cannot be maintained. In *Webster* v. *Cecil* (1) the purchaser was acting fraudulently in seeking to take advantage of what he knew to be a mistake.

COTTON, L.J.:—

It has been urged that if specific performance is refused the action must simply be dismissed. But in my judgment—and I believe the Lord Justice *James* is of the same opinion—as both legal and equitable remedies are now given by the same Court, and this is a case where, under the old practice, the bill, if dismissed, would have been dismissed without prejudice to an action, we should, if we were to refuse specific performance, be bound to consider the question of damages.

But in my opinion the decision of Lord Justice *Baggallay* is right. I will not attempt to define the cases in which the Court will refuse specific performance on the ground of mistake. The circumstances of each case have to be considered. Here in the particulars there is no specific reference to gardens, but there is a specific reference to the closes 454, 455, on the tithe map as comprising the property. The Defendant says, "I was under a mistake, and believed that my purchase comprised something not included in those closes." He had no right to make such a mistake, and though he knew that the gardens had for years been occupied and held together with these tenements, he was bound to take notice of the description. In one sense he was not bound to look at it, but he cannot abstain from looking at it and say that he bought under a reasonable belief that he was buying something not included in it. There is no injustice in holding a man to a contract which specifically describes the property sold in a way not calculated to mislead.

(1) 30 Beav. 62.

JAMES, L.J. :— C. A. 1880 TAMPLIN v. JAMES.

I also am of opinion that where an action is brought for specific performance, and specific performance is refused on the sole ground of a mistake by the Defendant, the Court ought to give the same damages as would, under the old practice, have been given in an action at law.

Solicitors: *Abbott, Jenkins, & Abbott; James J. James.*

Ex parte BAYLY. *In re* HART.

C. A. 1880 July 15.

Liquidation Petition—Mortgagee in Possession—Injunction—Jurisdiction—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 12, 13, 65, 72—*Bankruptcy Rules*, 1870, *r.* 260.

When at the time of the filing of a liquidation petition the grantee of a bill of sale given by the debtor is in actual uncontrolled possession of the property comprised in the deed, the Court ought not to interfere by injunction with the exercise of the grantee's legal rights upon the mere suggestion that, if an injunction is granted, it is possible that the trustee in the liquidation, when appointed, may be able to raise a case for impeaching the validity of the deed.

In order to justify such an interference the applicant for the injunction must at least swear to his belief of some facts which, if established, would render the deed invalid as against the trustee in the liquidation.

THIS was an appeal from a decision of Mr. Registrar *Brougham*, acting as Chief Judge in Bankruptcy.

On the 11th of May, 1877, *L. A. Hart*, a cigar merchant and dealer, who carried on his business at No. 15, *St. Swithin's Lane*, in the city of *London*, executed a mortgage deed in consideration of £2500 advanced to him by *A. O. Bayly*, whereby he demised to *Bayly*, his executors, administrators, and assigns, the house and premises No. 15, *St. Swithin's Lane*, for the unexpired residue of the term granted by the lease under which *Hart* held the same, less the last day thereof, subject to the proviso for redemption thereinafter contained. And *Hart* thereby also assigned to *Bayly* the goodwill of his business, and all the goods, wares, merchandise, stock-in-trade, fixtures, furniture, articles, effects, and things belonging to *Hart* in respect of his business or used in the same,

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subject to the proviso for redemption thereinafter contained. There was a declaration that all fixtures, furniture, goods, wares, merchandise, articles, and things which should during the continuance of the security be brought upon the leasehold premises should be included in the security. The proviso for redemption stipulated for a surrender of the leasehold premises and a reassignment of the chattels if *Hart*, his heirs, executors, administrators or assigns, should on demand by *Bayly*, his executors, administrators, or assigns, or voluntarily, not sooner than ten years from the date of the deed, pay the £2500, and also such a sum in lieu of interest as should be equal to half the net profits of the business. The deed also contained a power for *Bayly* to take possession of the mortgaged premises; a power of sale in case of default, and provisions as to the carrying on of the business.

The deed was not registered as a bill of sale.

On the 17th of June, 1880, *Bayly* served a written notice on *Hart*, requiring him to pay the principal and interest which was due on the security of the deed, and stating that, if he made default in payment, *Bayly* would proceed to take possession of the chattels and effects comprised in the deed, and would proceed to dispose of the same. *Hart* made default in payment, and on the same day an accountant named *Ogle*, by the direction of *Bayly*, took possession of the leasehold premises and the stock-in-trade and other chattels, and put up printed bills in the windows of the house announcing that the lease of the premises, the business, and the fixtures, stock-in-trade, and other effects would be sold by order of the mortgagee. Notices were also sent to the trade debtors requiring them to pay their debts to *Bayly*. *Ogle* proceeded to carry on the business on behalf of *Bayly*. On the 29th of June *Hart* filed a liquidation petition, and on his application a receiver of his property was appointed, and an order was made restraining *Bayly* until after the 8th of July from taking any further proceeding against *Hart* under the seizure made by him under the mortgage deed. In support of his application for the receiver and injunction, *Hart* made an affidavit in which he said that *Bayly* refused to allow him to enter into and upon the premises at No. 15, *St. Swithin's Lane*, for the purpose of carrying on the business, and that he (*Bayly*) was then in sole, entire, and

uncontrolled possession thereof. *Hart* also said that by the provisions of sect. 5 of the Act 28 & 29 Vict. c. 86, *Bayly* was postponed for the purpose of dividend until all *Hart's* other creditors had received 20*s.* in the pound on the amount of their respective debts. Immediately after this order was made the receiver went to the premises and took possession of the property, and took down the bills which *Ogle* had put up. Upon an application by *Bayly* the Registrar afterwards, on the 1st of July, ordered the receiver to restore the bills which he had taken down and to withdraw from possession, on the ground that *Bayly* was in possession as mortgagee before the filing of the liquidation petition. On the 8th of July the debtor and the receiver applied to the Court to continue the interim injunction until further order. An affidavit in support of the application was made by the receiver, his solicitor, and the debtor, in which they said that under sect. 5 of the Act 28 & 29 Vict. c. 86, *Bayly* was a partner in the business of *Hart*. The affidavit contained no suggestion that *Bayly's* security was in any way invalid. The Registrar made an order continuing the injunction until after the 3rd of August.

Bayly appealed.

Winslow, Q.C., and *Frank Evans*, for the Appellant:—

Bovill's Act (28 & 29 Vict. c. 86) does not affect the rights of a mortgagee: *Ex parte Sheil* (1). There was no jurisdiction to grant an injunction in such a case: *Bankruptcy Act*, 1869, ss. 12, 13, 72; Bankruptcy Rules, 1870, r. 260. And, if there is jurisdiction, no case has been made for its exercise. There is no evidence impeaching the validity of the mortgage.

Horton Smith, Q.C., and *J. E. Linklater*, for the receiver:—

There is ample jurisdiction under sects. 65 and 72, and rule 260. to grant the injunction: *Ex parte Anderson* (2); *Ex parte Sheriff of Middlesex* (3). The injunction was granted because a trustee had not been appointed, in order to keep the property *in statu quo* until the trustee, when appointed, could obtain evidence as to the validity of the deed. There is reason to believe that the deed

(1) 4 Ch. D. 789. (2) Law Rep. 5 Ch. 473.
(3) Law Rep. 12 Eq. 207.

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can be impeached. The circumstances are very suspicious. At any rate, it is clear that the book debts are not included in the deed.

[JAMES, L.J.:—I see nothing to include them. The mortgagee cannot be allowed to go on receiving them.]

Winslow, for the mortgagee:—

They must be collected by somebody. The Appellant is willing to undertake to pay what he receives into Court and to keep an account.

JAMES, L.J.:—

I think that will be the best thing to do about the book debts. I am of opinion that the order was improvidently issued by the Registrar. It is not necessary to go into the question whether this is the sort of case in which the Court would exercise its special jurisdiction under sect. 72. There is really no ground suggested upon any affidavit or upon any evidence of which we can take the slightest notice for interfering with the mortgagee's right to possession under his security. He was in uncontrolled possession under his security at the time of the bankruptcy. The only case suggested is this: We cannot give you any evidence now which raises any equitable case against his legal right, but if you will allow us to go on and to get a trustee appointed, and will allow the trustee to examine witnesses, it is not impossible that some case may be found out for impeaching the mortgage deed. It is not the business of any Court of law or equity or bankruptcy to interfere with a man's actual legal possession upon the mere suggestion that possibly somebody or other may be able to make a case against him.

BRETT L.J.:—

There is really nothing to be said in support of the order; there is not even a colourable case for it.

COTTON, L.J.:—

I agree that there is nothing to be said in support of the order; but I think it right to say something as to the reasons why such

an order should not be made. Courts of Equity are always very unwilling to interfere with the legal rights of mortgagees, and, so far as I know, they hardly ever do so without requiring the money due on the security to be paid into Court, or other ample security to be given to the person who is seeking to exercise his rights as mortgagee. Then what ground was there for interfering in any way with the rights of the mortgagee? The affidavits disclose no ground whatever. There is a suggestion that the mortgagee was really a partner with the debtor, and I suppose also a suggestion that under *Bovill's Act* he must be postponed as regards his mortgage security to all the other creditors. That is not an arguable point. It is also said that some evidence may be discovered which may possibly raise a case against the deed. No Court would be justified in acting on such a suggestion as that. Courts of Equity did indeed grant interlocutory injunctions without the evidence which would justify them in making a decree, that is to say, if it were necessary to interfere for the preservation of property until the hearing of a suit, they acted on hearsay evidence when a person pledged his belief of certain facts which, if they were established at the hearing, would justify the making of a decree. Under such circumstances, if the Court saw that there was a reasonable case to be tried at the hearing, it would interfere and keep the property *in medio* until at the hearing the rights of the parties could be decided. But the Court never did that upon the mere suggestion of a possibility that if an injunction were granted some case would be made out; it did so only when a person swore to his belief that facts existed which would justify the Court in interfering with the legal right of the Defendant.

In the present case no one has sworn to his belief of any facts which would justify the interference of the Court with the mortgagee's legal rights.

The order of the Registrar was discharged, the mortgagee giving an undertaking to pay into Court forthwith any of the debtor's book debts which he might receive, and to keep an account.

Solicitor for Mortgagee: *Edward Henley.*
Solicitor for Receiver: *W. Crook.*

C. A.
1879
M. R.
Nov. 18.

C. A.
1880
March 2;
July 12.

In re D'ANGIBAU.
ANDREWS *v.* ANDREWS.

[1879 D. 80.]

Infant—General Power of Appointment—Different Classes of Powers—Power coupled with an Interest—Power Collateral, or in Gross—Marriage Settlement—Infant Married Woman—Volunteers—Next of Kin.

By a settlement made on the marriage of a lady then, and therein described as, "an infant of the age of nineteen years and upwards," it was agreed that, after the marriage, as soon as the case would admit, certain personal estate standing in the names of the trustees of her father's will in which the lady would take a vested interest on her marriage subject to an annuity for her mother's life, should be assigned to trustees, in trust for investment with the consent of the husband and wife, and to pay the income to the wife for her separate use, and after her death to her husband till bankruptcy or alienation; and then to hold the capital on trusts for the issue of the marriage; and, in default of such issue, in trust for such person or persons as the wife should by deed or will appoint. The wife appointed the fund by deed to her husband, and died without issue, being still an infant. An action having been brought by the trustee in the husband's bankruptcy, who was also the legal personal representative of the wife, against the next of kin of the wife, claiming the property:—

Held, by *James* and *Brett*, L.JJ. (*dissentiente Cotton*, L.J.), affirming the decision of *Jessel*, M.R., that the appointment by the wife, while still a minor, was valid.

Hearle v. *Greenbank* (1) commented on.

Held, also, by the whole Court, that whether the appointment was valid or not, the wife's next of kin, being volunteers, could not claim under the settlement in opposition to her legal personal representative.

DEMURRER.

By the settlement, dated the 12th of October, 1874, and made, prior to the marriage of *Robert Perryman* with *Mary Frances D'Angibau*, between the said *R. Perryman* of the first part, the said *M. F. D'Angibau*, therein described as "an infant of the age of nineteen years and upwards," of the second part, and the trustees of the third part, after reciting that, under the will of her father, *John Cleife D'Angibau*, the said *M. F. D'Angibau* would, on her attaining twenty-one or marrying, become entitled to a share of the fund arising from his residuary real and personal estate by the

(1) 3 Atk. 695.

said will devised and bequeathed in trust for sale, subject to the payment of an annuity of £300 to her mother out of the income of the fund; and that upon the treaty for the marriage it was agreed that such share should be settled, it was witnessed and agreed that, in case the intended marriage should be solemnized, the husband and wife and all other necessary parties should, as soon as the case would admit, assign the said share to the trustees of the settlement, subject to the said annuity, upon trust that, when the trust premises should fall into possession, they should either retain the same in their then state of investment, or should at any time or times "with the consent in writing" of the husband and wife during their joint lives, and of the survivor of them during his or her life, sell the same or any part thereof and invest the moneys to arise from such sale. And after enumerating the investments authorized, "with power for the said trustees or trustee from time to time, with such consent as aforesaid, to vary the said investments," it was declared that the trustees should stand possessed of the trust funds thereby settled, "In trust to pay the income thereof unto the said *Mary Frances D'Angibau* during her life, for her sole and separate use, free from the control, debts, or engagements of the said *Robert Perryman*, and so that she should not have power while under coverture to dispose thereof in the way of anticipation;" and after her decease to pay the said income to the said *Robert Perryman* until his bankruptcy or alienation. And after the usual provisions for the benefit of the children and remoter issue of the marriage, it was agreed and declared that, in default of such issue, and subject to the trusts thereinbefore declared, the trust funds should be held, "In trust for such person or persons and for such purposes as the said *Mary Frances D'Angibau* shall by deed, with or without power of revocation and new appointment, or by will or codicil appoint; or in default of such appointment, and so far as no such appointment shall extend, upon the trusts following (that is to say), if the said *M. F. D'Angibau* shall survive the said *Robert Perryman*, in trust for the said *M. F. D'Angibau*, her executors, administrators, and assigns; but if the said *R. Perryman* shall survive the said *M. F. D'Angibau*," in trust for her next of kin under the Statutes of Distribution, exclusive of her husband.

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By a deed-poll dated the 20th of March, 1875, Mrs. *Perryman*, being still a minor, appointed that the settled trust funds should, subject to the trusts in the settlement contained for the benefit of herself, her husband, and the issue of the marriage, be held in trust for her husband absolutely.

Mrs. *Perryman* died on the 20th of September, 1876, without having attained twenty-one, and without issue. After her death her husband went into liquidation by arrangement, the Plaintiff being appointed trustee. Trust funds to a large amount were then standing in the names of the trustees of the will of *John Cleife D'Angibau*, representing Mrs. *Perryman's* share of his residuary estate.

At Mrs. *Perryman's* death her next of kin under the provisions of the settlement consisted of her mother and infant brother, who accordingly claimed to be entitled to the settlement funds on the ground that Mrs. *Perryman*, being a minor, had no power to make any appointment under the settlement, and consequently that the appointment of the 20th of March, 1875, was invalid.

On the other hand the Plaintiff, who was also Mrs. *Perryman's* legal personal representative, claimed to be absolutely entitled to Mrs. *Perryman's* interest under her father's will.

This action was accordingly instituted by the Plaintiff against the executors and trustees of the will, the trustees of the settlement, and Mrs. *Perryman's* mother and brother as her next of kin under the settlement, claiming, 1, administration of the estate of *John Cleife D'Angibau*, and an injunction to restrain the Defendants, his trustees, from parting with Mrs. *Perryman's* share therein; and, 2, a declaration that the Plaintiff, as trustee in *R. Perryman's* liquidation, was entitled to Mrs. *Perryman's* share in her father's estate subject only to the £300 annuity.

The Defendants, the next of kin, demurred to the statement of claim on the ground that the Plaintiff had no interest in the testator's estate sufficient to maintain the action.

The demurrer was argued before the Master of the Rolls on the 18th of November, 1879.

Ince, Q.C., and *T. L. Wilkinson*, for the demurrer:—

We submit that Mrs. *Perryman*, being a minor, could not exer-

cise her power of appointment: consequently the appointment is bad, and the property goes as in default of appointment.

This is a power coupled with an interest, and it seems to have been settled that an infant cannot exercise a power coupled with an interest, or in gross, but only a power simply collateral: *Sugden* on Powers (1).

It is true that in *In re Cardross's Settlement* (2) your Lordship has held that an infant can exercise a power, even though it be coupled with an interest, where an intention appears that it should be exercisable during minority; but in that case it was necessary for the due management of the settled property that the power—which was a power to consent to a reinvestment—should be vested in the infant, a necessity which does not exist here.

Moreover, all gifts or instruments made or executed by an infant are either voidable or absolutely void: *Bacon's* Abridgment (3); *Simpson* on Infants (4).

But assuming that *In re Cardross's Settlement* was rightly decided, the question remains whether in the present case an intention appears that this power should be exercisable by Mrs. *Perryman* during her minority. Upon that we submit that a contrary intention is apparent. In the first place this so-called settlement is an incomplete instrument: it is really only an agreement or articles for settlement, pointing to another and more complete instrument to be executed at a future time when a settlement could be binding on the lady, that is to say, when she had attained twenty-one, and when she could, therefore, undoubtedly exercise powers conferred upon her by such settlement.

In the next place, the power of appointment by will is coupled with the power of appointment by deed; and inasmuch as, under the *Wills Act* (1 Vict. c. 26), an infant cannot make a will until he has attained twenty-one, the fact of the two powers being coupled together is an indication of intention that the power by deed shall not be exercisable at an earlier period than the power by will.

Chitty, Q.C., and *Phillpotts*, for the Plaintiff, were not called

(1) 8th Ed. p. 911.
(2) 7 Ch. D. 728.
(3) Vol. iv. p. 367, tit. "Infancy and Age."
(4) Ed. of 1875, p. 53.

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upon, but referred to *Sugden* on Powers (1), *Bacon's* Abridgment (2), and *Simpson* on Infants (3), in support of the view that an infant may, as regards personal estate, exercise a power coupled with an interest.

Jessel, M.R. :—

I cannot allow this demurrer, but there is a question of some interest to be decided. My view of the case is that the appointment is good: and that is the real and substantial question.

The case is one of some singularity, because I cannot find that the exact point has been decided anywhere. It seems to be clearly settled, as laid down by Lord *St. Leonards* in his work on Powers, that the exercise by an infant of a power simply collateral, as it is called, is valid. Why, when the law was altered as to the execution of powers, they did not bring the execution by infants of powers by deed to the same point as the execution by will is not for me to say. As a matter of fact, the Legislature has not interfered, and therefore I have only to ascertain what the law always was and still is.

That being so, the exercise by an infant of a power simply collateral being valid both as to real and personal estate, the first question I have to consider is, as regards personal estate, what becomes of a power in gross, as it is sometimes called, not being a power simply collateral, and not being a power appendant?

I had better state what I mean, because the words are used in so many different senses by different writers. The first power, a power simply collateral, I understand to be a power given to a person who has no interest whatever in the property over which the power is given. The second power, a power in gross, is a power given to a person who has an interest in the property over which the power extends, but such an interest as cannot be affected by the exercise of the power. The most familiar instance is that of a tenant for life with a power of appointment after his death. Then the third kind of power is a power exercisable by a person who has an interest in the property, which interest is

(1) 8th Ed. p. 177.

(2) Vol. iv. p. 366, tit. "Infancy and Age."

(3) Ed. of 1875, p. 40.

capable of being affected, diminished or disposed of to some extent by the exercise of the power. That power is commonly called a power appendant or appurtenant.

As regards the first power, that is, a power simply collateral, it is settled—so it appears from such a book of authority as *Sugden* on Powers—that that power can be exercised by an infant. On principle, it is very difficult to see why it is so settled. I mean, it is very difficult to see why, if discretion is required for the disposal of property, it should not be so in the case of the exercise of a power: and one would think there is as much judgment or discretion wanted for the exercise of a power as for the disposal of property. However, as the law stands, that appears not to be so: and the reason, if reason is to be found anywhere, seems to be this—that it requires more discretion to dispose of your own property than to dispose of other people's. That is the only reason I can find. We find expressions such as Vice-Chancellor *Wood* used in *King* v. *Bellord* (1), of the infant being, in exercising the power, "a mere conduit-pipe"; but, on principle, it is very difficult to understand that the same amount of discretion or judgment should not be required in both cases, and that an infant can actually distribute property of other people though the same infant cannot dispose absolutely of a shilling of his own property.

But however that may be, the law is settled. Lord *St. Leonards* says this (2): "After an examination, in a former edition of this work, of the authorities which will now be found in the Appendix (*b*), it was submitted that an infant could not exercise a power over *real estate* unless it was a power *simply* collateral;"—that is the first kind of power—"but as to personalty, clearly he might exercise a power over that at the age at which, by law, he might dispose of personalty to which he was absolutely entitled."

Now these words are quoted from *Hearle* v. *Greenbank* (3), and the same words are found in *Bacon's* Abridgment (4). Oddly enough, it is not said what the age is. There was really no age, as far as I am aware, at which it was settled law that an infant might

(1) 1 H. & M. 343, 348.

(2) Sugden on Powers, 8th Ed. pp. 177–8.

(3) 3 Atk. 695.

(4) Vol. iv. p. 366, tit. "Infancy and Age."

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dispose of any personalty to which he was absolutely entitled. Some kinds of personalty he might dispose of by actual delivery; but all gifts made by him were either voidable or absolutely void. Therefore you are left pretty well where you were, except to this extent, that it is clearly settled that an infant may exercise some powers under age, otherwise the passage I have read would have no meaning at all. Therefore Lord *St. Leonards* lays it down that, as to personalty, an infant may exercise a power.

When we come to the Appendix to the work we find that, after citing a case of *Grange* v. *Tiving*, before Chief Justice *Bridgeman*, Lord *St. Leonards* in commenting upon it says (1): "*Bridgeman's* distinction, that a power of revocation and new appointment may be executed by an infant to the extent of the revocation, though not further, would probably not be followed at this day. His reasoning is not satisfactory, either with reference to the capacity of the infant, the donee, or the intention of the donor. His opinion was, that an infant may execute a power appendant, but he does not discuss the real question, viz. whether such a power is not in the nature of property, and therefore incapable of being exercised by an infant."

Now, I suppose Lord *St. Leonards*, when he says "a power in the nature of property," means "a power in the nature of the infant's property;" the real question being whether the infant could dispose of the property the subject of the power.

That, then, is the position of matters as far as regards personal estate. As regards real estate, I have commented upon it, and stated what the authorities are, in the case of *In re Cardross's Settlement* (2), and I am not going over that ground again: but there seems to be a question here whether there is a manifest intention shewn by the settlement that the power shall be exercisable by an infant. Upon that it seems to me, as I said in that case, that wherever that intention is shewn the power can be exercised by the infant.

In this case I have to consider first, whether, independently of any express intention shewn, the power can be exercised by an infant; and it appears to me it can. If it is clearly settled that the first class of powers—powers simply collateral—can be so exer-

(1) Page 913. (2) 7 Ch. D. 728.

cised, there can be no reason why the second class of powers should not be so exercised, when its exercise cannot affect the infant's interest: I can see no sufficient distinction between the two cases. There is a very pertinent distinction between those two classes of power and the third, which seems to be alluded to by Lord *St. Leonards,* where the exercise of the power affects the infant's property. It may be well said there that the infant cannot do any act affecting his property through the medium of a power any more than he can do so directly: but where the exercise of the power only affects other people's property, it does appear to me that, if the rule is settled with regard to the first class of power, that rule should also apply to the second class of power. It can make no difference in the world that the infant has some interest under the settlement, so long as that interest cannot be affected by the exercise of the power.

Therefore, considering the rule clearly settled as to the first class of powers, I should have held it to extend to the second class of powers, independently of the authority which says that there is a difference between realty and personalty.

On that ground—and I should like to put it on that simple ground—I consider that the power was in this case well exercised.

But if I were driven to consider the second point, I think there is sufficient intention shewn by this settlement that the power may be exercised during infancy: and for that purpose one must look at the settlement. The settlement begins by stating that the lady is an infant of the age of nineteen years and upwards: then, the share proposed to be settled being a vested interest in the lady at twenty-one or marriage, it states that the arrangement is that that share shall be settled; and then it is agreed that after the marriage the share shall, as soon as the case will admit, be assigned to the trustees, upon trust (subject to the payment of an annuity of £300 to the lady's mother) for investment with the consent of the lady and her husband. This power of consenting to investments seems to me to be intended to be exercisable during minority. Then it says, "In trust to pay the income thereof unto the said *Mary Frances D'Angibau* during her life, for her sole and separate use." There is a clear intention to make an immediate provision for the wife for her separate use even during infancy.

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Nobody will argue that she is to wait till she is twenty-one to get the money: it is a provision during infancy. Then after her decease the trustees are to pay the income to her husband, if he shall survive her, until bankruptcy or alienation: and then the capital is to be held on trusts for the benefit of the children and remoter issue of the marriage; but on failure of such issue, "In trust for such person or persons and for such purposes as the said *Mary Frances D'Angibau* shall by deed, with or without power of revocation and new appointment, or by will or codicil appoint; or in default of such appointment, and so far as no such appointment shall extend, upon the trusts following:" then the first trust is for the wife, and that trust takes effect immediately if she survives her husband, whether she is an infant or not. Then, if she dies in the lifetime of her husband, the trust is for her next of kin, excluding her husband.

Now, all these trusts are clearly to take effect during her minority; and it seems to me to be quite plain that the precedent power must also have that effect.

It was suggested that because the power was by deed or will, and because by will it could not be effectually exercised till the lady was of age, therefore it could not be exercised by deed: but the answer is that an infant can exercise a power by deed but cannot by will.

It therefore seems to me that this settlement certainly intended that the power should be exercisable during minority, because the whole scheme of the settlement is that it takes effect immediately, although the wife is expressed to be a minor on the face of the instrument.

That being so, I am of opinion that the Plaintiff is entitled, and the demurrer must be overruled.

C. A.

From this decision the Defendants appealed. The appeal was heard on the 2nd of March, 1880.

Ince, Q.C., and *T. L. Wilkinson*, for the Appellants:—

It is settled that an infant cannot exercise a power of appointment if it is coupled with an interest; and where it is in gross, affecting the property in which the infant has an interest but not

affecting his interest in it, it is decided in *Hearle* v. *Greenbank* (1) that he cannot exercise it over real estate. There is no distinction in principle between real and personal estate, except perhaps where the power is to be executed by will. In *In re Cardross's Settlement* (2), the Master of the Rolls held that an infant might exercise an authority although coupled with an interest, if the settlor shewed an intention that it should be exercised during the infancy of the donee. But there is no such intention shewn in the present settlement.

The Master of the Rolls assumed that the power in the present case did not affect the infant's interest. But we do not admit that. In default of issue the property goes to the wife surviving, and even if the husband survived, the lady might have exercised the power for her own benefit, and by exercising it as she did she prevented herself from so doing.

It is suggested by the Defendants, though the point was not argued in the Court below, that the property is still reversionary, and that the Defendants are merely volunteers and have no equity to enforce the provisions of the settlement. But this is not the case of an ordinary incomplete voluntary settlement: the husband bound himself by his covenant, which was made in consideration of marriage, that he would give up his interest in the property. He has had the benefit of the marriage contract, and it was part of that contract that the property should go to the wife's next of kin in preference to himself. Whether the next of kin are within the consideration of the marriage depends upon the terms of the settlement: *Simson* v. *Jones* (3); *Newstead* v. *Searles* (4); *Clarke* v. *Wright* (5); *Johnson* v. *Legard* (6); *Gale* v. *Gale* (7); *Dart's* Vendors and Purchasers (8).

Chitty, Q.C., and *Phillpotts*, for the Plaintiff:—

With respect to the power of the infant to execute the power, we contend that there is no authority that in the case of personalty an infant cannot execute a power which does not affect

(1) 3 Atk. 695.
(2) 7 Ch. D. 728.
(3) 2 Russ. & My. 365.
(4) 1 Atk. 265.
(5) 6 H. & N. 849.
(6) 3 Madd. 283.
(7) 6 Ch. D. 144.
(8) Page 894.

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his own interest: *Hearle* v. *Greenbank* (1); *Sugden* on Powers (2); *Bacon's* Abridgment (3). In the second place, there is a manifest intention shewn that the appointment may be made during infancy. A settlor has a right to stipulate that property shall go as an infant shall appoint; and there is a necessary implication here that this was the husband's intention: *In re Cardross's Settlement* (4). In the third place, the appointment of an infant is not void, but voidable only: and no one can set it aside except a person claiming under the infant, which in this case is the Plaintiff: *Whittingham's Case* (5). The Defendants have no right to interfere. They are not within the marriage contract, but are mere volunteers. The property is still reversionary in the hands of the trustees of the father's will, and there are no words in the settlement which amount to a declaration of trust on the part of the husband: *Zouch* v. *Parsons* (6); *Allen* v. *Allen* (7); *Lumsden's Case* (8); *In re Michell's Trust* (9); *Colyear* v. *Countess of Mulgrave* (10); *Sutton* v. *Chetwynd* (11); *Davenport* v. *Bishopp* (12); *Price* v. *Easton* (13); *Jefferys* v. *Jefferys* (14); *Kekewich* v. *Manning* (15); *Richardson* v. *Richardson* (16).

Ince, in reply.

July 12. COTTON, L.J.:—

This is an appeal from a judgment of the Master of the Rolls on a demurrer filed by certain of the Defendants to the statement of claim. The Plaintiff is the trustee in bankruptcy of one *Robert Perryman*, and he is also the legal personal representative of *Mary Frances Perryman*, the late wife of the bankrupt. The Plaintiff by his action seeks to have it declared that he is entitled to certain funds bequeathed to *Mary Frances Perryman* by the will of her father, and for consequential relief, and the demurrer

(1) 3 Atk. 695.
(2) 8th Ed. p. 177.
(3) Vol. iv. p. 366.
(4) 7 Ch. D. 728.
(5) 8 Rep. 42, b.
(6) 3 Burr. 1794.
(7) 2 D. & War. 307.
(8) Law Rep. 4 Ch. 31.
(9) 9 Ch. D. 5.
(10) 2 Keen, 81.
(11) 3 Mer. 249.
(12) 2 Y. & C. Ch. 451.
(13) 4 B. & Ad. 423.
(14) Cr. & Ph. 138.
(15) 1 D. M. & G. 176.
(16) Law Rep. 3 Eq. 686.

raises the contention that he is not entitled to any interest in that property. *Mary Frances Perryman* was at the time of her marriage, under the will of her father, entitled to considerable personal estate. She, when still a minor, and some time in the month of October, 1874, married *Robert Perryman*, and the question in this action refers to a sum of money which, under the will of her father, was set apart to provide for an annuity for her mother, who is still living, and her interest in this fund was at the time of the marriage, and still is, reversionary. It is still held by the trustees of the father's will to provide for the annuity given to the widow.

Previously to the marriage of Mr. and Mrs. *Perryman* an indenture of settlement was executed, which, under the circumstances, was the settlement of the husband only. By it *Robert Perryman* covenanted that, in the event of the marriage taking place, he and all other necessary parties would assign to trustees the interest to which his intended wife was entitled under the will of her father in the fund set apart to provide for the annuity of his widow, and that they should hold the fund upon trust for the intended wife for her life for her separate use, and after her death, upon certain trusts for the benefit of *Robert Perryman* till he should become bankrupt, and after the death of the intended wife and failure of the trusts in favour of the said *Robert Perryman*, in trust for the issue of the marriage, and if there should be no issue of the marriage who should become absolutely entitled, in trust as the said intended wife should by deed or will appoint. And in default of such appointment, if the said *Robert Perryman* should survive her, in trust for the persons who, under the statutes for the distribution of the effects of intestates, would, on the death of the said *Mary Frances Perryman*, have been entitled thereto if she had died possessed thereof intestate and a widow.

There was no issue of the marriage, and *Mary Frances Perryman* died when still an infant. She, by a deed-poll dated in March, 1875, purported to exercise the power of appointment in favour of her husband. She died on the 20th of September, 1876. Her husband survived her, and shortly after her death he filed a petition in bankruptcy for the liquidation of his affairs, and the Plaintiff has been appointed trustee under resolutions which have

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been duly passed for the liquidation of the estate of the said *Robert Perryman*. The trustees of the marriage settlement were made Defendants to the action. They, by their statement of defence, did not insist on the settlement, but submitted that the mother and brother of the said *Mary F. Perryman* should be made Defendants. This was done, and the mother and brother filed a demurrer to the Plaintiff's statement of claim. This was overruled by the Master of the Rolls; hence the appeal to us. The Master of the Rolls did not call on the Plaintiff to support his claim, and the case was dealt with as if his title depended solely on the exercise by *Mary Frances Perryman* of the power of appointment. The Master of the Rolls was of opinion that the power was to be considered as in gross, that is, as he explained his meaning, one which though not simply collateral did not affect any interest of the infant. He was of opinion that although an infant cannot exercise a power appendant, he may validly exercise a power in gross, and further, that even if the power was not to be dealt with as a power in gross, there was a clear intention that the power might be exercised during infancy, and that the exercise was therefore valid. I am unable to concur in this view of the Master of the Rolls. There is very little authority as to the exercise by an infant of a power over personal estate. *Hearle* v. *Greenbank* (1) is, as regards powers over personal estate, only an authority that a power to appoint by will can be exercised during infancy after the infant has attained the age when, independently of any power, he could make a will of personal estate; and the passage of Lord *St. Leonards* (2) referred to by the Master of the Rolls and in argument before us does not carry the case any further. That passage is as follows: "An infant cannot exercise a power over real estate unless it be a power simply collateral, but as to personalty, clearly he may exercise a power over that at the age at which by law he may dispose of personalty to which he is absolutely entitled." There is no authority that a power the exercise of which can affect the interest of the infant, or one in gross, can be exercised by an infant, except where infancy would not, if there were no power, prevent him from disposing of the property. I think, in the absence of authority, that on principle an infant cannot exer-

(1) 3 Atk. 695. (2) Sugden on Powers, 8th Ed. p. 177.

cise a power like the present one, which, in my opinion, is in the nature of property—by which I mean that the trusts of the settlement, independently of the trusts for the children and husband, were intended to put the wife as nearly as possible in the same position as regards the enjoyment of and power over the property settled as if she were a *feme sole*.

To hold that an infant can exercise such a power would, in my opinion, be to allow an infant to bind her property, which the law, on general principles of public policy, says she cannot do. The case might be different if there were an indication of intention on the part of the donor of the power that it might be exercised notwithstanding the infancy of the donee. The mere fact that a power which may not have to be exercised for many years is given to a person who at the time is an infant is not, in my opinion, a sufficient indication of intention that the power may be exercised during infancy; and I am unable to find that the settlement expresses any such intention. The fact that this power may be exercised by deed or will is, I think, against there being any such intention, as no will can be made by an infant, and, as at the date of the settlement the property settled was reversionary, and the wife was, though an infant, upwards of nineteen years of age, there is, I think, no presumption that the consent to a change of investment would have to be made during her infancy. In my opinion there was not any valid exercise of the power.

This was the only point dealt with by the Master of the Rolls. But the Plaintiff contended before us that his title did not depend solely on the exercise of the power. The fund in question has never come to the hands of the trustees of the settlement, and the Plaintiff contended that he, as legal personal representative of the deceased *Mary F. Perryman*, has a legal title to the fund; that the contention of the Defendants in support of their demurrer must be based on this, that the Court at their instance will, as against the Plaintiff's legal title, enforce the settlement; and the Plaintiff contends that this it will not do, because the settlement contains no declaration of trust on the part of the husband, and is merely a covenant by him to make a settlement, and that the demurring Defendants must be considered as volunteers, and that the Court will not, at the instance of the demurring Defen-

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dants, enforce the contract to make a settlement against the legal title of the Plaintiff. I am of opinion that the Plaintiff's contention on this point is correct.

The first question for consideration is, whether the settlement of 1874 can be considered as a declaration of trust constituting the relation of trustee and *cestui que trust* as between the husband and his assignees on the one part, and the demurring Defendants on the other part, because if it can be so treated effect will be given to the trusts even in favour of volunteers. But on the construction of the settlement it is clear that the husband never constituted himself or intended to be a trustee of the fund. He contracts to make a settlement by transferring the fund to trustees, who were to hold it upon trust, and the distinction between a complete voluntary trust and a voluntary contract to create a trust is clear. If it is once established that the settlement is not a declaration of trust, there is, in my opinion, an answer to the contention of the Defendants that the Court, at their instance, would interfere with the legal title of the Plaintiff. If the Court enforces a contract to create a trust, whether contained in a marriage settlement or in any other instrument, it will enforce it in its entirety. But as a rule the Court will not enforce a contract as distinguished from a trust at the instance of persons not parties to the contract: *Colyear* v. *Countess of Mulgrave* (1). The Court would probably enforce a contract in a marriage settlement at the instance of the children of the marriage, but this is an exception from the general rule in favour of those who are specially the objects of the settlement. The demurring Defendants were not parties to the contract nor within the consideration of the marriage, and, in my opinion, they are not entitled to enforce against the legal title of the Plaintiff the contract to create a trust contained in the settlement. It was urged that a decision to this effect would be contrary to the judgment of the Court of Exchequer Chamber in the case of *Clarke* v. *Wright* (2), and especially to the reasons given by Mr. Justice *Blackburn*. But in that case the Court was considering a very different question, namely, whether a limitation to collaterals in a marriage settlement of real estate was void as against a subsequent purchaser for value under the Act of 27 Eliz. The settlement had

(1) 2 Keen, 81. (2) 6 H. & N. 849.

been executed and completed by a conveyance of the property, and for the conveyance in its entirety there was a sufficient consideration to prevent any of the estates created from being defeated by a subsequent sale. That is a very different question from that which arises in the present case. I am of opinion that the demurring Defendants cannot interfere with or control the legal estate of the Plaintiff, and that the demurrer must be overruled.

BRETT, L.J.:—

Upon the second point I entirely agree with the judgment of my Brother Lord Justice *Cotton*, and that is of itself sufficient to determine the dispute in this case. But inasmuch as the other point was fully argued, and is a point of great importance, and may perhaps, upon appeal, be of importance in this case, he has thought it right to give a judgment upon that point. I entirely agree with him in the propriety of so doing, and I think it my duty, therefore, to state my opinion also upon the first point. With some diffidence, in consequence of the opinion of my Brother *Cotton*, I have come to a contrary conclusion.

I have considered this point, and considered it often. It seems to me that the power given in this case was what I should prefer to call a pure mandate, that is to say, it was a power which did not deal with any property or interest of the infant, but did deal with the property and the interest in the property of the settlor. Even if it affects some interest of the infant, I think that the proper inference from the document is, that it was the intention of the settlor that the power should be exercised by the infant whilst an infant.

The power given is a mandate; the moment that mandate is exercised it seems to me that the mandator's intention takes legal effect, not from the exercise of the mandate, but from the gift of the person who delegated the power to exercise his will. It is said that he having given that power to a person whom he knew at the time was an infant, the power of exercising that delegated authority is to be suspended till the infant comes to full age. Inasmuch as the power is given by a person who had full authority to give that power, who delegated that which he could have most effectively done himself if he had chosen, it seems to me that to

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say that that power is to be suspended till the infant comes to full age, is, to say the least of it, a most artificial doctrine. If it were to be exercised with regard to real estate, I think we should be bound to say that it could not be exercised till the infant was of full age, bound by an authority which at this time we are not at liberty to overrule; but I must confess that the same reasoning which leads me to the conclusion to which I now come, would, if it had not been for authority, have brought me to the same conclusion with regard to real estate.

That authority which we are bound to obey with regard to real property is founded, as I venture to say, in my opinion, upon one of those artificial rules applied to real property which have done more to bring the law into popular question than any other part of its administration, but we are bound with regard to real property.

With regard to the exercise of this power by will, we are bound by Act of Parliament, but it seems to me the Act of Parliament goes a long way to shew what was the opinion of the Legislature, for they were not contented to say that no will can be made by an infant, but, foreseeing that these mandates might be treated, not as the will of the person who was exercising the mandate, but only as an exercise of the mandate with a peculiar solemnity, they put into the Act of Parliament, and thought it necessary to put in, a particular clause to say that, even where it was the exercise of a power of appointment, it could not be done unless the person had arrived at a full age.

We are bound, therefore, in the case of real property, by authority, and with regard to the exercise of the power of appointment over personal estate by will, by an Act of Parliament; but unless there is some principle which should carry the rule further, it seems to me that we are not bound to carry it one step further when we are dealing with personal estate. This being a pure mandate (in my opinion) which does not deal with any property of the infant, is there any rule which prevents us from saying that that power may be exercised by deed during the infancy? As a general rule, an infant may exercise a mandate, and if this had been a power to appoint by writing or under her hand only, I can see no reason why it should not have been exercised at any time. Is there any rule, therefore, why it should not be exercised by

deed? It is not a deed really taking effect as the deed of the infant: it is the exercise of the mandate by a peculiarly solemn form, and that is all. I see no reason why this mandate may not be exercised by the form of a deed executed during infancy.

The artificiality of the suggested rule seems to me to be shewn more clearly where the case arises under a marriage settlement of an infant female than in any other case. It does seem strange upon any principle that a person who is either the husband, as in this case, or a father or other relation who is allowing a female to marry, who thereby makes her the head of a family, who thereby makes her the head of a household, who thereby makes her, under certain circumstances, the guardian of her children, should be supposed, when he gives this particular power, to come to this extraordinary conclusion, that although she has all the other powers, yet if she has more than one child before she is twenty-one, and has a power given to her to appoint as between those children, that power is to fail and become wholly ineffective if she happens to die before she is twenty-one, so that there shall be no appointment among her children.

I confess that seems to me to shew the extreme artificiality of this rule more than anything that one can offer to one's mind.

But then there is the other point, what is the intention to be implied in such a case as this? Now here is a person giving the power; he gives this power in terms which have no reference to time. According to all the ordinary rules of construction the time of its exercise would commence from the beginning. There is no reason why it should not. But it is said this power is to be postponed, although there are no words of postponement. It strikes my brother *Cotton* that because the power must be postponed in the case of the will, therefore the true inference is that the person intended to postpone it in the case of the deed. It is strange how differently things affect different minds on questions of construction. I should rather myself conclude that, having given the power to perform this by will and also by deed, the contrary inference would be drawn, that he meant to say, "By deed till she is twenty-one, and by deed after she is twenty-one if she so elects, but by will not till after twenty-one, because the law forbids me to give that power."

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On both points it seems to me, with great deference, that the view of the Master of the Rolls was right, and that, as a general rule, in cases of personal property, unless there are words to postpone the exercise of the power, that power is intended to be commenced, and does commence, by law, from the time when the power can first be exercised.

JAMES, L.J.:—

I entirely concur in the reasoning by which Lord Justice *Cotton* arrived at the conclusion in support of the decision of the Master of the Rolls as to the second point—that is to say, that the persons claiming adversely to the Plaintiff are volunteers who have no right whatever to obtain specific performance of a mere covenant which has remained as a covenant and has never been performed. But I also concur with the Master of the Rolls in the ground upon which he has put his judgment, and which has been expressed by Lord Justice *Brett*. My view goes even further than that which the Master of the Rolls thought it necessary to express as to those powers. According to my view an infant may be an agent. An infant may be the donee of a power of attorney. It is difficult to understand why he may not be the donee of a power in a will or other settlement as well as the donee of an ordinary power of attorney. *Hearle* v. *Greenbank* (1), which is the only decision on the subject, no doubt decided that an infant could not exercise a power over real estate, but the judgment was expressly and carefully limited to real estate, and is, if not an implication that it was otherwise as to personal estate and probably otherwise as to gavelkind estates in *Kent*, at least no authority to the contrary. As to personal estate it has been considered by eminent text writers as an authority that an infant could exercise powers over personal estate, and it has, I think, been understood by conveyancers that there is this distinction, for while provision has always been carefully made for the exercise of powers over land during the minority of a tenant for life, no such provision, as far as I am aware, is ever introduced into settlements of personal estate, and I should be sorry to express any doubt that a *feme covert* infant can exercise the ordinary powers contained in a

(1) 3 Atk. 695.

marriage settlement of personalty unless there be something to raise the presumption that it was not so intended, and I can see nothing in the settlement before me to raise such a presumption.

Of course an infant could not by settlement or otherwise give himself a power: the power in this case is given by the adult husband.

It was announced before that the Master of the Rolls' judgment was affirmed, and of course affirmed with costs.

Solicitors: *Yarde & Loader*, agents for *Pearson & Whidborne, Dawlish; Wilkins, Blyth & Fanshawe.*

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[1879 S. 120.]

Investment Trust—Association of more than Twenty Persons for Gain—Companies Act, 1862, *s.* 4.

Shares in a number of submarine telegraph companies of the aggregate nominal amount of £400,000 were purchased by subscription and vested in trustees. Each subscriber received for every £90 subscribed a certificate for the nominal amount of £100, and a deferred coupon for one 4200th part of the funds, the number of certificates being 4200. The trusts of the funds were declared by a deed between the trustees and a covenantee on behalf of the certificate holders. The trustees were to apply the income of the shares in payment of interest at £6 per cent. on the nominal amounts of the certificates, and apply the surplus in redeeming the certificates. It was provided that the trustees might at their discretion sell any of the shares if they could be sold at a premium of not less than 30 per cent. over the price given for them, but that, except in that case, none of them should be sold unless at a meeting of the trustees it was unanimously resolved to be for the interest of the certificate holders that shares to be specified in the resolution should be sold. The proceeds of every sale were to be applied in the redemption of certificates, unless the trustees by an unanimous resolution, confirmed by a meeting of certificate holders, determined to reinvest in submarine telegraph shares. Meetings of the certificate holders were to be held for the purpose of receiving reports from the trustees on the affairs of the trust, of appointing auditors, and of appointing new trustees in the place of trustees who should die, retire, or become incapable to act. After all the certificates had been redeemed the funds in hand were to be divided among the holders of the deferred coupons. The holders of the certificates were more than twenty in number:—

Held, by the Master of the Rolls, that this was an association of more than

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twenty persons formed for the purpose of carrying on business having for its object the acquisition of gain within the *Companies Act*, 1862, s. 4; that not being registered it was illegal; and that a judgment ought to be given for the Plaintiff in an action by a certificate holder for winding it up and distributing the funds among the certificate holders.

Held, by the Court of Appeal,—

1. That the certificate holders did not form an association within the meaning of the *Companies Act*, 1862, s. 4.

2. That the object of the deed of settlement was not to authorize the carrying on of a business within the meaning of the section, but to provide for the management of a trust fund, and that even if the powers of selling the shares and reinvesting the proceeds could be considered to authorize the carrying on of a business, these provisions being merely subsidiary, and not forming any substantial part of the object, would not bring the case within the Act.

3. That, supposing the deed to authorize the carrying on of a business, such business was carried on only by the trustees, who carried it on as trustees, and not as agents or directors, and that as they were fewer than twenty, the case was not within the Act.

Sykes v. *Beadon* (1) disapproved.

In re Arthur Average Association (2) doubted.

THIS was an action seeking to have the *Submarine Cables' Trust* wound up as being an illegal association.

The trust was constituted by a deed dated the 6th of September, 1871, between Sir *James Anderson* and five other persons (thereinafter called the said trustees) of the one part, and *Philip Rose* (thereinafter called the covenantee), "for and on behalf of all the holders for the time being of the certificates hereinafter mentioned," of the other part: whereby, after reciting that divers persons had subscribed in, or for the purchase by the said trustees of, the stock, shares, and debentures of certain submarine telegraph companies, the particulars of which were set forth in the first schedule; and that the said stock, shares, and debentures had been transferred to, and then stood registered in the names of the said trustees in the books of the said companies respectively; and that it was intended to issue to the said subscribers 4200 certificates in the form set forth in the second schedule, a certificate of the nominal amount of £100 being delivered in respect of every subscription of £90; and that it was also intended to issue as part of the said certificates, documents in the form set forth in the third schedule, and thereinafter called coupons of reversion, one of such

(1) 11 Ch. D. 170. (2) Law Rep. 10 Ch. 542.

coupons being delivered in respect of every subscription for £90, in addition to the certificate of £100: the trustees jointly and severally covenanted with the covenantee, his executors, administrators, and assigns, for and on behalf of all the holders for the time being of the said certificates, as follows:—

"1. The said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, and all new trustees to be appointed as hereinafter provided (hereinafter called the trustees) shall hold the said stock, shares, and debentures so transferred to the said trustees as aforesaid (and hereinafter called the scheduled securities), and all annual produce thereof, upon trust to give effect to the provisions of these presents.

"2. The annual produce of the scheduled securities shall be applied in manner following: (1.) In payment of all expenses during the preceding year, but so that the ordinary expenses of the year 1871, or in any subsequent year including all remuneration to the trustees and auditors, and the bankers' commission for payment of dividends and redemptions, shall not exceed £2000. (2.) In payment of interest at six per centum per annum on the nominal amount of the said certificates to the holders thereof for the time being. (3.) In the redemption, as hereinafter provided, of so many of the said certificates as the surplus income arising from the said securities shall be competent to redeem.

"3. The trustees shall make their payments of interest half-yearly, on the fifteenth day of April and the fifteenth day of October in every year, the first payment of interest to be for three months, and to fall due on the fifteenth day of October, 1871.

"4. If in any year the annual produce of the scheduled securities shall, after payment of all expenses, be insufficient for payment of interest at six per centum per annum as aforesaid on the nominal amount of the said certificates, the available moneys shall be divided amongst the holders of the certificates *pari passu*, and the deficiency of such interest shall form a first charge upon all subsequent receipts, subject only to the annual allowance for expenses.

"5. The trustees shall, as soon as conveniently may be after the 15th day of April, 1872, and thenceforward after the 15th day of April, and 15th day of October, in every year, apply any surplus

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income remaining in their hands after payment of such expenses and interest as aforesaid, in redeeming as many of the said certificates as they shall be able by either of the following methods, or partly by one method and partly by the other, to redeem:— (1.) By purchase of the said certificates in the open market, provided that the price paid for each of the said certificates be less than £120. (2.) By tender from the certificate holders for the redemption of the certificates held by them, provided that no tender shall be accepted at a higher price than £120.

"6. Notice of the intention of the trustees to receive tenders for the redemption of certificates shall be given by advertisement in such newspapers as the trustees shall select for that purpose.

"7. If, at the expiration of any year after the redemption of as many certificates as possible by either or both of the said methods, the trustees shall have surplus funds applicable to the redemption of certificates, they shall redeem, in the manner hereinafter mentioned, as many certificates as such surplus funds shall be competent to redeem, at the price of £120 for each certificate.

"8. The certificates to be redeemed as in the last clause mentioned shall be selected by lot in the presence of a notary public. The selection shall be made on such day and at such place as the trustees shall appoint, notice thereof being given in some *London* daily paper at least one week previously, and any holder of a certificate may attend.

"9. The trustees or trustee present on each such selection shall superintend the selection by lot, and the result of each meeting for selection shall be recorded in a book kept for that purpose, which shall be open for the inspection of the holders of certificates, and shall also be advertised in some *London* daily paper within three days following the actual selection.

"10. If any holder of a certificate shall so require, the notary public present at such selection shall make a statutory declaration of the result of such selection by lot.

"11. No certificate shall carry interest after it has been drawn for payment, or after the acceptance of a tender for the redemption of such certificate has been notified to the holders thereof, whether its amount be demanded and received by its holder or not.

"12. If any holder of a certificate drawn for payment shall not demand and receive the amount thereof within six months from the date of such drawing, it shall thereupon be advertised twice in a *London* daily paper, and if not then demanded within six months from the date of such advertisement, the amount shall not be payable till the final division of the fund.

"13. So soon as all the certificates shall in manner hereinbefore provided have been redeemed, the securities then remaining subject to the trusts of this deed shall be realized under the directions of the trustees, and the net proceeds thereof shall be divided between the holders for the time being of the coupons of reversion in the proportion of the nominal value of the said coupons held by them respectively.

"14. Provided, that if the undertakings of the said Submarine Telegraph Companies or any of them shall, during the continuance of the trust, be purchased by or on behalf of Her Majesty the Queen, her heirs or successors, or any foreign Government, and the scheduled securities on any of them shall thereupon be redeemed, and it shall thereupon be decided by a unanimous resolution of the trustees, at a meeting called with express notice of the object, at which all the trustees are present in person or by proxy, that it is expedient to terminate the trust, and such resolution shall be confirmed at a meeting of the certificate holders summoned for that purpose by advertisement in two *London* daily papers, the trust shall thereupon be terminated, and the securities remaining subject to the trusts of this deed shall be realized under the direction of the trustees, and the net proceeds thereof, after satisfying interest, shall be employed in the redemption of the certificates in manner aforesaid, and the remainder shall be divided between the holders of coupons of reversion in manner aforesaid.

"15. All moneys received on account of the trust may, if the trustees shall so think fit, until the next time of distribution arrives, be invested in the purchase of Exchequer Bills, or be placed at a deposit account in the names of the trustees in the *Bank of England*, or at some other bank, and any interest arising from such *interim* investment shall be dealt with as part of the annual produce of the scheduled securities.

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"16. The scheduled securities shall be deposited in the names of the trustees, and kept at the bank of Messrs. *Glyn, Mills, Currie, & Co.*, or some other bank, to be selected by the trustees, and the dividends and all other moneys paid on account of the said securities shall be collected and received by the said Messrs. *Glyn, Mills, Currie, & Co.*, or such other bank as aforesaid.

"17. It shall be the duty of the trustees to keep proper accounts of all receipts and payments made by them, and of all other matters proper to shew the position of the trust securities, and the manner in which the trustees perform their duties.

"18. It shall be lawful for the trustees, at their discretion, to sell any of the said scheduled securities, if and when such securities shall be capable of being sold in the market, and shall be sold by the trustees at a premium of not less than 30 per cent. over the price at which the same were purchased or taken over by the trustees, and the proceeds of such sale shall be applied by the trustees as hereinafter provided.

"19. Except as in the last clause provided, none of the scheduled securities shall be sold or otherwise converted into money, unless at a meeting of the trustees called with express notice of the object, at which there are present not less than four trustees, it shall be unanimously resolved by the trustees present that it is expedient for the interest of the certificate holders that certain of the said securities, to be specified in the resolution, shall be sold and converted into money or otherwise dealt with or disposed of.

"20. The produce of every such sale or conversion as aforesaid shall be applied in the same manner as the surplus income arising from the annual produce of the scheduled securities: provided always that it shall be lawful for the trustees, if it shall be so decided by a unanimous resolution of the trustees, at a meeting called with express notice of the object at which all the trustees are present, in person or by proxy, and such resolution shall be confirmed at a meeting of the certificate holders summoned for that purpose by advertisement in two *London* daily papers, to reinvest the produce of any such sale or conversion, or any part of the same, in the purchase of such securities, of the same character as the scheduled securities, as they shall select for that purpose, and all securities so purchased shall be held subject to the trusts

of this deed as if they had formed part of the original scheduled securities.

"21. The trustees may appoint a secretary, and delegate to him such duties in connection with the trusts of these presents as they may think fit, including a power to sign receipts, certificates, and other documents on behalf of the trustees, and may pay to him such salary or other remuneration as, having regard to the total amount allowed for expenses, they may think fit.

"22. The trustees may deduct for the year 1871, and in every subsequent year, by way of remuneration to them for the trouble and responsibility undertaken by them, any sum not exceeding in the aggregate £1200 per annum.

"23. The trustees shall once in every year, by advertisement in some two public daily newspapers published in *London*, call together a meeting of the holders for the time being of the certificates.

"24. At such meeting no person shall be present who does not produce his certificate, and persons shall vote in proportion to the value of the certificates produced by them.

"25. The proceedings of the said meeting shall, so far as may be, be conducted in the manner prescribed in Table A to the *Companies Act*, 1862.

"26. The business of the meeting shall be:—(*a.*) To receive and consider a report from the trustees on the condition and affairs of the trust. (*b.*) To appoint auditors to audit the accounts of the trustees, and to report to the next meeting of the holders of certificates. (*c.*) To elect new trustees to supply any vacancies in that body.

"27. Each of the auditors shall receive such payment, not exceeding fifty pounds per annum, as the meeting appointing them shall direct.

"28. If it shall be unanimously decided by the trustees at a meeting called with express notice of the object, at which not less than four trustees are present in person, or by proxy, that any extraordinary expenses should be incurred, they may incur the same accordingly, subject to the same being confirmed by resolution of the certificate holders assembled at any general meeting.

"29. At any meeting of the trustees any trustee who is not

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present may vote by a proxy given to any trustee who is present; and the vote of such proxy, upon all questions at such meeting, shall be taken and recorded as the vote of such absent trustee, and have the same force and effect as if he had voted in person.

"30. If the persons parties hereto of the first part, or any of them, or any trustee or trustees appointed as hereinafter provided, shall die or become incapable to act, or shall retire from the trusts, then and in every such case it shall be lawful for the general meeting of the certificate holders by resolution to appoint a new trustee or new trustees in the place of the late trustee or trustees. And upon every such appointment all the securities, subject to the trusts hereof, shall be delivered into the custody as aforesaid of such new trustee or trustees jointly with the continuing trustees. And every trustee so appointed as aforesaid shall in all respects act and be responsible as if he had been named as a trustee in this deed.

"31. Every such new trustee shall, at the cost and expense of the trust fund, as one of its ordinary expenses, enter into a covenant with a covenantee to be named by the remaining trustees for the time being, covenanting for the acts of himself and his co-trustees, in the same manner and to the same effect as the covenants herein contained, and on the delivery of such deed of covenant to the covenantee all liability of the preceding trustee or his estate shall thenceforth cease.

"32. In the event of the general meeting of certificate holders so requiring, the trustees for the time being will at the cost and expense of the trust fund, as one of its ordinary expenses, enter into a similar deed to these presents with a new covenantee or covenantees, to be named by the said general meeting of certificate holders.

"33. The trustees shall not be under any obligation in any circumstances to sell, call in, or convert into money any of the securities, or to take any proceedings for the purpose of recovering or enforcing payment of any securities, or of the dividends or interest payable thereon, and the trustees or trustee for the time being shall be respectively chargeable only for such moneys, stocks, funds, and securities as they shall respectively actually receive, notwithstanding their respectively signing any receipt for

the sake of conformity, and shall be answerable and accountable only for their own acts, receipts, neglects, or defaults, and not for those of each other, nor for any banker or other person with whom any securities or moneys may be deposited, nor for the insufficiency or deficiency of any securities, stocks, or funds, nor for any other loss, unless the same shall happen through their own wilful default respectively; and the trustees shall be entitled to deduct and retain out of the trust funds all expenses sustained or properly incurred by them, and not hereinbefore expressly provided for, in carrying into effect the trusts of these presents."

The first schedule contained the particulars of stock and shares, of the nominal amount of £400,036 in the whole, in eleven different submarine telegraph companies.

The form of certificate given in the second schedule was as follows:—

"*The Submarine Cables' Trust.*

"No. Certificate for £100.

"This is to certify that the holder of this certificate is entitled to the sum of £100, part of the nominal amount of £420,000, forming the *Submarine Cables' Trust*, and to all the benefits secured to holders of certificates by the deed of trust, of which a copy is hereon endorsed."

The form of the coupon of reversion given in the third schedule was as follows:—

"*The Submarine Cables' Trust.*

"No. Coupon of Reversion.

"This is to certify that the holder of this coupon will, on the final division of the funds of the above-mentioned trust, after satisfaction of all certificates and interest, be entitled to one equal four thousand two hundreth part of the net proceeds of such funds, in accordance with the terms of the deed of trust, a copy of which is endorsed on the certificate to which this coupon is attached."

Before the formation of the trust a prospectus was issued to invite subscriptions to it. This prospectus stated that there was to be an issue of £1,000,000 in certificates of £100 each issued at £90, which were to bear interest at £6 per cent. "Certificates to

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be redeemed half-yearly out of surplus income to the extent of the available funds by purchase in the open market or tender, or failing these means, by yearly drawings of £120." The prospectus further stated that there would be "an equal reversionary distribution of the securities of the trust among the certificate holders as soon as the certificates have been redeemed." "The trust will consist solely of the stocks, shares, or debentures of submarine cable companies, which offer apart from accidental interruptions the prospect of a high rate of interest." "The annual receipts from the investments will be first applied after deducting the limited amount of expenses in paying the interest on the certificates." "The redemption of the certificates will be effected half yearly by the trustees by purchases in the open market, or by the acceptance of tenders from the certificate holders, which will be invited by public advertisement. Should those means be found inadequate to exhaust the surplus income, the redemption will be effected at yearly drawings at the price of £120." "A person desirous of holding *Submarine Cable* shares can thus by means of this trust at a minimum of trouble and expense diminish the risk of investing in any one particular undertaking by spreading his investment over a number of different undertakings, and reserve a portion of the extra interest as a sinking fund to pay off his capital, as for each £90 invested he virtually becomes a holder of *pro ratâ* investments in some eight or ten different securities, and in addition receives a bonus when his certificate is redeemed and *pro ratâ* participation in the ultimate reversion, which will remain when the return of his capital has been accomplished. The advantages are—(1.) Interest at £6 13*s.* 4*d.* on the amount subscribed. (2.) Distribution of risk. (3.) Provision for redemption of certificates, if by purchase, securing for his property an enhanced market value, or if drawn, a gain of £30 per share." Some further clauses of the prospectus will be found in the judgment of the Master of the Rolls.

The 4200 certificates of the nominal value of £100 each were issued as provided by the deed, and the holders were more than twenty in number.

After the execution of the deed two of the companies mentioned in Schedule 1 were amalgamated, and the trustees received stock

in the amalgamated company in lieu of their stocks in the original companies. Three other of the companies were also amalgamated, and the trustees in lieu of the stock or shares which they held in them, amounting to the nominal sum of £110,390, received shares in the amalgamated company to the nominal amount of £128,054. In September, 1872, the trustees sold 2000 of the last-mentioned shares, which were of the nominal value of £20,004, thus reducing their holding to £108,050. They also, under Article 18 of the trust deed, sold 2000 shares in another of the companies mentioned in Schedule 1 for £27,393, and invested the proceeds in the purchase of certificates pursuant to Article 5. In 187 two other of the companies mentioned in Schedule 1 were amalgamated, and the trustees received shares in the amalgamated company in lieu of their stock and shares in the original companies. The above were the only changes which had taken place in the funds subject to the trust. No certificates were ever selected for redemption by lot.

The present action was commenced in March, 1879, by *H. R. Smith*, a holder of one certificate, on behalf of himself and all other the holders of certificates against the trustees. The statement of claim alleged that the Defendants and the holders of certificates were an association of more than twenty persons formed after the passing of the *Companies Act*, 1862, for the purpose of carrying on business that had for its object the acquisition of gain by the association or the individual members thereof without being registered as a company under the Act, or in pursuance of any other Act, or of any letters patent; and that the drawing the certificates for purchase by lot was a lottery or a transaction of the nature of a lottery, and was contrary to law; and that the provisions relating to such drawing rendered the trust an illegal association. The Plaintiff claimed to have the funds distributed among the certificate holders in proportion to the amounts subscribed or paid by them respectively for their certificates, or otherwise according to their interests therein.

The action came on for trial before the Master of the Rolls on the 19th of December, 1879.

Ince, Q.C., and *C. B. McLaren*, for the Plaintiff.

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Chitty, Q.C., and *Speed*, for the Defendants.

JESSEL, M.R.:—

This case has been argued before me, nominally with a view to distinguish it from *Sykes* v. *Beadon* (1), but of course that is not the real meaning of the argument. It is, as Mr. *Chitty* told me candidly, and I am very glad of it, in order that the case may be taken to the Court of Appeal, where, of course, the decision of *Sykes* v. *Beadon* itself will be reviewed. There really are no substantial differences between that case and the present.

As regards the only point which was not elaborately discussed in *Sykes* v. *Beadon*, the meaning of the word "business," I must say a few words. In *Sykes* v. *Beadon* the only point I had to consider was whether it was an association formed for the purpose of gain. The supposed distinction between an association formed for the purpose of gain and an association formed for the purpose of taking upon itself a business having for its object the purpose of gain was not there argued, but it has been argued since, and I have given an opinion upon it which I will repeat. First, what is the meaning of "any other business"? Now "business" itself is a word of large and indefinite import. I have before me the last edition of *Johnson's Dictionary*, edited by Dr. *Latham*, and there the first meaning given of it is, "Employment, transaction of affairs"; the second, "an affair"; the third, "subject of business, affair, or object which engages the care." Then there are some other meanings, and the sixth is, "something to be transacted." The seventh is, "something required to be done." Then taking the last edition of the *Imperial Dictionary*, which is a very good dictionary, we find it a little more definite, but with a remark which is worth reading: "Business, employment; that which occupies the time and attention and labour of men for the purpose of profit or improvement." That is to say, anything which occupies the time and attention and labour of a man for the purpose of profit is business. It is a word of extensive use and indefinite signification. Then, "Business is a particular occupation, as agriculture, trade, mechanics, art, or profession, and when used in connection with particular employments it admits of the plural

(1) 11 Ch. D. 170.

that is, businesses." Therefore the Legislature could not well have used a larger word.

In addition to the two dictionaries I have also looked at the case of *Harris* v. *Amery* (1), in which forty-six people hired some land to carry on a farm, that is, they carried on the farm between them. A single man carrying on a farm may farm his own land, but he is carrying on a business. Sometimes he is called a gentleman farmer, but he is still carrying on a business, and, of course, these forty-six persons were carrying on a business, and it was held that it was an illegal association under this very Act of Parliament, because there were more than twenty of them. The passage I am about to read is from the judgment of that very eminent and lamented Judge Mr. Justice *Willes* (2): "It should seem, by the 25 & 26 Vict. c. 89, s. 4, that the Legislature, viewing the frauds which had been committed by large companies, and the great inconvenience which was found to arise by reason of the difficulty of enforcing claims and settling accounts between surviving members and executors of deceased members, and otherwise, have thought fit to determine that no company, association, or partnership consisting of more than twenty persons, shall be formed for the purpose of carrying on any business that has for its object the acquisition of gain by the company or its members, unless registered under the Act. And I think it has done that by language which does not admit of any reasonable doubt. It is unnecessary to refer to authorities to shew that 'business' has a more extensive signification than 'trade.' The earlier Bankrupt Acts did not embrace farmers: but it was never doubted that farming was a 'business' though not a 'trade.' Banking is not strictly a trade. Where land comes to a number of persons by operation of law, they cannot be said to be partners, and they may, consistently with the Act, farm it. But when we find an association like this, which is rendered illegal by an Act of Parliament, we cannot take notice of the agreement under which they become tenants, for the purpose of establishing a right in a Court of law, or hold that the occupation by one of their body is an occupation by all the members of the illegal association."

Now, knowing what "business" means, is there any distinc-

(1) Law Rep. 1 C. P. 148. (2) Law Rep. 1 C. P. 154.

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tion between a person carrying on any other business which has for its object the acquisition of gain, and the words "formed for the purpose of the acquisition of gain"? It must be a business to acquire gain, and really the words add nothing to it. "Formed for the purpose of gain," as I put it in *Sykes* v. *Beadon* (1), is the same thing. You cannot acquire gain by means of a company except by carrying on some business or other, and I have no doubt if any one formed a company or association for the purpose of acquiring gain, he must form it for the purpose of carrying on a business by which gain is to be obtained. But whether that be so or not, I am clearly of opinion that where investment is made a business, or where the dealing in securities is made a business, it is a business within the purview of this Act. There are many things which in common colloquial English would not be called a business, even when carried on by a single person, which would be so called when carried on by a number of persons. That is a distinction not to be forgotten, even if we were trying the question by the ordinary use of the English language. For instance, a man who is the owner of offices, that is, of a house divided into several floors and used for commercial purposes, would not be said to carry on a business because he let the offices as such; but suppose a company was formed for the purpose of buying a building, or leasing a house, to be divided into offices, and to be let out, should not we say, if that was the object of the company, that the company was carrying on business for the purpose of letting offices, or was an office-letting company, trying it by the use of ordinary colloquial language? The same observation may be made as regards a single individual buying or selling land, with this addition, that he may make it a business, and then it is a question of continuity. A man occasionally buys and sells land, as many landowners do, and nobody would say he was a land-jobber or dealer in land, but if a man made it his particular business to buy and sell land to obtain profit, he would be designated as a land-jobber or dealer in land.

When you come to an association or company formed for a purpose, you say at once that it is a business, because there you have that from which you would infer continuity; it is formed to

(1) 11 Ch. D. 170.

do that and nothing else, and, therefore, at once you would say that the company carried on a business. So in the ordinary case of investments, a man who has money to invest, invests his money and he may occasionally sell the investments and buy others, but he is not carrying on a business. But when you have an association formed, or where an individual makes it his continuous occupation—the business of his life to buy and sell securities—he is called a stock-jobber or share-jobber, and nobody doubts for a moment that he is carrying on business. So, if a company is formed for doing the very same thing, that is for investing money belonging to persons in the purchase of stocks and shares, and changing them from time to time, either with limited or unlimited powers, I should say there can be no question that they are carrying on a business, whether you call it a business of investment or a business of dealing in securities, or, as in the case before me, both the business of investment and the business of dealing in securities.

Upon the other point, as to this company being formed for the acquisition of gain, can there be any doubt about it? The prospectus was not stated in the statement of claim, but it was admitted, and Mr. *Chitty* admitted it as if it were stated, so that it is before the Court and may properly be looked into, for in ascertaining whether the association was formed for that purpose nothing can be more important than the prospectus. It is not to be formed for the purpose unless registered as a company under this Act, and the prospectus tells me exactly what it was formed for. The prospectus is as good, or better evidence upon that point than the deed, but of course they must both be looked at to ascertain for what purpose the company was formed. Was it for the acquisition of gain? I have discussed that question so fully in so many cases, and two of them are reported, *In re Arthur Average Association* (1) and *Sykes* v. *Beadon* (2), that it is not necessary for me to say anything more upon the view I take of the Act. But I must look at the prospectus as well as the deed to see whether the acquisition of gain is really the purpose of the company. I have no doubt about it at all. To my mind it is as clear as anything can be, though it does not follow that it may not

(1) 3 Ch. D. 522. (2) 11 Ch. D. 170.

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be equally clear the other way to some other mind or minds. The public are invited by the prospectus to subscribe their money to buy the shares of the Submarine Cable Companies. They are told that they are to buy them at £90 a certificate. "The certificate is to bear 6 per cent. per annum, payable half yearly, making £6 13*s.* 4*d.* on the amount paid." That is a very accurate calculation. Therefore they are to get £6 13*s.* 4*d.* upon their money. "Certificates to be redeemed half yearly out of surplus income to the extent of the available funds, by purchase in the open market or tender, or, failing these means, by yearly drawings at £120." So that a certificate holder is to get a profit of £30 upon his £90 if he is lucky enough to be a drawer, or if they are bought by tender; and there is to be "an equal reversionary distribution of the securities of the trust among the certificate holders as soon as the certificates have been redeemed." Therefore, over and above £6 13*s.* 4*d.* per cent., which is itself a very handsome profit, and not the ordinary rate of income derivable from investments, a certificate holder is to get £30 profit upon his £90, and also the equal reversion in distribution of the balance when the certificates are all paid for.

Those are the three first paragraphs of the prospectus. It is not an ordinary investment in any sense of the word; it is a speculation with a view to a profit by means of the purchase of *Submarine Cable* shares, and it would be an abuse of the term to call this an investment, though the purchase of speculative property in a sense, and in a very wide and lax sense, may be termed an investment. Then after naming the trustees, I come to the next paragraph, which is a very good illustration of what kind of investments we are dealing with. "The advantage of this form of investment, by distributing the risk over a number of kindred undertakings, and making one insure the other, is peculiarly applicable to the class of property to be embraced in this trust." That is, the public are told it is risky property. The next sentence is, "The public has already shewn its appreciation of the principle in the case of Foreign and Colonial Government Securities, and it is believed that many would gladly avail themselves of the high returns yielded by Telegraph Cable Companies, if they were relieved from the fear of exceptional losses from accident or other

causes which would be greatly lessened by such a combination." It is no ordinary investment, the public are afraid to touch it because it is risky, but if you distribute it in the shape of insurance by associating together you will diminish your risk, and thereby get a profit.

The next sentence but one shews that the company was formed for a high rate of profit: "The trust will consist solely of the stocks, shares, or debentures of submarine cable companies, which offer, apart from accidental interruptions, the prospect of a high rate of profit." Then there is this further statement: "The selection and acceptance of the several securities, the proportions in each company to be included, and any purchase to be made, will be determined and undertaken by the trustees at their discretion, who will endeavour to secure a fair average, having regard to the ends in view." Then it is stated how the trustees are to apply the funds. First they are to pay a limited amount of expenses; then to pay interest on the certificates; then there is to be a sinking fund for their redemption; then they say how they will be redeemed. Then, "Power will be reserved to the trustees to realize, at their discretion, any securities belonging to the trust which reach a premium of 30 per cent. on the purchase price." That is a dealing. The trustees are not to sell unless they get a large profit, but they are to sell when they get to 30 premium. Then it says: "Subject to any special circumstances calling for an earlier dissolution under the terms of the trust deed, it is intended that the trust should continue until all the certificates have been thus redeemed, when the trust securities will remain for distribution as a reversion. The trust will then be wound up, and the proceeds be distributed *pro ratâ* among the holders of the coupons of reversion."

This, then, is the purpose for which the company is formed. The certificate holders are not only to get the profit I have mentioned, but an ultimate profit—an ultimate distribution of the funds. That is no ordinary investment where the property is to remain invested; on the contrary, all the certificates may be paid off out of income, it being a very large rate of profit, and then the securities are to be divided, the coupons giving the right to the reversion. The prospectus further states: "A person desirous of

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holding submarine cable shares can thus, by means of this trust, at a minimum of trouble and expense, diminish the risk of investing in any one particular undertaking, by spreading his investment over a number of different undertakings, and reserve a portion of the extra interest as a sinking fund to pay off his capital; as for each £100 invested he virtually becomes a holder of *pro ratâ* investments in some eight or ten different securities, and in addition receives a bonus when his certificate is redeemed, and a *pro ratâ* participation in the ultimate reversion which will remain when the return of his capital has been accomplished. The advantages are—1. Interest at £6 13*s.* 4*d.* per cent. on the amount subscribed. 2. Distribution of risk"—not a term that persons use for ordinary investments—"3. Provision for redemption of certificates; if by purchase, securing for his property an enhanced market value, or, if drawn, a gain of £30 per certificate." The first part which I read used the term "profit," now we have the term "gain." Then, "4. A reversion eventually divisible equal to the whole of his original subscription." It is further stated that a draft of the trust deed may be seen. This trust deed was actually drawn after the investments were made, although I do not see that that makes much difference after having read the prospectus to see what the company was formed for. Then it is provided that the trustees are to hold the annual produce of the investments in trust, "First, In payment of all expenses during the preceding year, but so that the ordinary expenses for the year 1871, or in any subsequent year, include all remuneration to the trustees and auditors." They are called trustees, but they are, no doubt, directors. They are, like all directors, commercial trustees, but they are intended to be paid—not improperly, because they really are directors and nothing else.

There are two or three clauses in the deed which it is necessary to read to shew that there was a dealing in shares by this company, as well as an ordinary investment. An association for that purpose would, in my opinion, be within the mischief of the Act and within the words of the Act. It must not be supposed that I decide this case simply on the addition of the dealing clauses, but an association for the purpose of dealing would also be, in my opinion, within the mischief of the Act and the words of the

Act also; consequently, it is as well to refer to them to shew that it is so.

The 18th clause is this: "It shall be lawful for the trustees, at their discretion, to sell any of the said scheduled securities, if and when such security shall be capable of being sold in the market, and shall be sold by the trustees at a premium of not less than 30 per cent." So that the moment they rise to that the trustees may sell and take the profit, which is to be divided as we shall see presently.

The 19th section provides that except when they get the 30 per cent. premium, none of the scheduled securities shall be sold or otherwise converted into money, unless in pursuance of a unanimous resolution passed at a meeting of the trustees called with express notice of the object, at which there are present not less than four trustees. Out of the six managing parties four must concur at a meeting at which they are present to sell them, but subject to that limitation, they have a right to sell without any premium at all. Here, again, therefore, there is a second power of sale not referred to in the prospectus. Then the produce is to be applied as surplus, that is, in payment of interest and in payment for and purchasing of the certificates. Then there is a proviso, "That it shall be lawful for the trustees, if it shall be so decided by a unanimous resolution of the trustees, at a meeting called with express notice of the object, at which all the trustees are present in person or by proxy, and such resolution shall be confirmed at a meeting of the certificate holders summoned for that purpose by advertisement in two *London* daily papers, to invest the produce of any such sale or conversion, or any part of the same, in the purchase of such securities of the same character as the scheduled securities, as they shall select for that purpose." So there is a power not only to sell but to repurchase. I agree that, inasmuch as in this large association—and this is admitted by the learned counsel, and has always been intended to be conceded—there are more than twenty persons, for I see on the prospectus there is not to be a company formed unless £400,000 is subscribed, you cannot get the assent of every individual, but power is given to the trustees at the general meeting. It is a part of their business, there-

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fore, though no doubt not a primary object, but it is an object, to deal in the securities in the way I have mentioned.

The 22nd clause is this: "The trustees may deduct for the year 1871, and in every subsequent year, by way of remuneration to them for the trouble and responsibility undertaken by them, any sum not exceeding in the aggregate £1200 per annum." So they are paid trustees, that is, they are directors of the company. They are persons who carry on the business of the company for payment, they employ their time and they are paid for it. I am not saying a word against that; I think it is a most rational thing that persons who employ their time for the benefit of others should be paid, but it shews their true character, for ordinary trustees of a settlement are not paid. Then it goes on: "The trustees shall, once in every year, by advertisement in some two public daily newspapers published in *London*, call together a meeting of the holders for the time being of the certificates." That is to shew what the certificate holders are. They are shareholders of the company and nothing else. They are called certificate holders, but it is very clear that they might be called shareholders. Many shareholders, when they are paid, are paid, as we know, by warrants to bearer, and that is what these are. Nobody is to get anything unless he produces his certificate. Then, "The proceedings of the said meeting shall, so far as may be, be conducted in the manner prescribed in Table A to the *Companies Act*, 1862." Not only is it a meeting of shareholders, although the deed calls it a meeting of certificate holders, but they actually adopt the provisions of the Act for the mode of conducting the business. "The business of the meeting shall be"—that is the other use of the word "business"—"to receive and consider a report from the trustees on the condition and affairs of the trust; to appoint auditors to audit the accounts of the trustees"—that is, of the directors—"and to report to the next meeting of the holders of certificates; to elect new trustees." Again put "directors," and you have the ordinary business of a general meeting. It is the thinnest possible disguise. Then, "If it shall be unanimously decided by the trustees at a meeting called with express notice of the object, at which not less than four trustees are present in person or by proxy, that

any extraordinary expenses should be incurred, they may incur the same accordingly, subject to the same being confirmed by resolution of the certificate holders assembled at any general meeting." Then there is a provision in the 30th clause: "If any of the persons parties hereto"—that is, the trustees—"shall die or become incapable to act, or shall retire from the trusts, then and in every such case it shall be lawful for the general meeting of the certificate holders by resolution to appoint a new trustee or new trustees in the place of the late trustee or trustees. That is giving the directors a lifehold directorship, but it is nothing more. Then the 32nd clause empowers the general meeting of certificate holders to require the trustees to enter into a new deed of covenant in the same form as this.

It does appear to me that this is as plain a company or association formed for the transaction of business for the purpose of gain as could be put fairly into words, if you change names and nothing more. If you call the certificate holders "shareholders," and call the trustees "directors," and call the association a "company," changing those three names, you have about as simple a description of an ordinary company under the Act as I think you can well have. I am satisfied, as far as I am concerned, that this is not only within the words of the Act, but is the very thing, as explained by the judgment of Mr. Justice *Willes*, which the Act intended to prohibit for various reasons, and that this is a mere device, and a very transparent one, to endeavour to escape from the plain meaning of the enactment. I should have said that without any possibility of hesitation were it not that I have been told that either this deed or some similar deed was settled in consultation by two very great legal luminaries at the Bar. That may be so, and if it is so it will only form another instance among many which have come before me shewing that where counsel are instructed to carry out an object they do their best to carry it out, and the more difficult it is the more pains they take, and then valuing their work, not by its real result, but by the trouble it has caused them, they deceive themselves into the idea that they have succeeded in evading an Act of Parliament and have carried the purpose which they have been instructed to accomplish; they produce that which satisfies themselves, although it satisfies

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no judicial authority when it comes to be considered by a Court of Justice.

The judgment declared that the *Submarine Cables' Trust* was an association consisting of more than twenty persons formed after the passing of the *Companies Act*, 1862, for the purpose of carrying on business that had for its object the acquisition of gain by the association, or by the individual members thereof, without being registered as a company under the said Act, or any other Act of Parliament, and ordered that the affairs of the association should be wound up; with consequential inquiries and directions.

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The Defendants appealed. The appeal came on to be heard on the 13th of July, 1880.

Chitty, Q.C., and *Speed*, for the Appellants:—

We say that this is not carrying on a business. It is a trust for investment; the advantage being that the trustees can invest in a number of different securities of this class, so that the risk of loss by some proving bad is diminished, the average being good. Such an investment is not a "business." That word in its widest sense includes all the transactions of life, but that is not its meaning in the *Companies Act*, 1862. Again, if this be a business, the *cestuis que trust* are not associated for the purpose of carrying it on. They meet, indeed, but only for very limited purposes—they cannot control the investments, and they cannot change the trustees who have the management. Suppose a coalowner left his colliery upon trusts for thirty of his grandchildren, vesting the whole management in the trustees; the grandchildren cannot be treated as an association of thirty persons within the Act; the trustees are the only persons carrying on the business, and so they are here. *Cox* v. *Hickman* (1) shews that the certificate holders are not partners. "Business" in the Act means something in the nature of a trade. *Reg.* v. *Whitmarsh* (2), under 7 & 8 Vict. c. 110, is in our favour as to this not being a business. The case of *In re Arthur Average Association* (3) is very different from this,

(1) 8 H. L. C. 268. (2) 15 Q. B. 600.
(3) Law Rep. 10 Ch. 542.

and the question whether the association was legal was not finally decided by the Court of Appeal. Supposing, however, the decision of the Master of the Rolls in that case to be upheld, the holding that a mutual insurance company where the company as a body makes no gain is within the Act really does not bear upon the question whether a trust like this is within it. *Sykes* v. *Beadon* (1) is very similar to the present case, but is a recent decision of the same Judge, and is in fact to be treated as under appeal, though in that case the trusts more nearly resembled the carrying on a business than here. In the present case the object simply was to invest in a class of stocks paying a large dividend, not to carry on anything like stockjobbing or speculating in shares. The powers of changing investments are of a very limited description, and shew the intention that, except in special circumstances, the original securities should be retained. Articles 18, 19, 20, shew that it was no part of the scheme to carry on a business in buying and selling shares, and the conduct of the trustees shew that this was what was intended: hardly any change has been voluntarily made in the investments. The Master of the Rolls laid great stress on the prospectus.

[JAMES, L.J.:—How can the prospectus be admissible except that it might be evidence to shew that the parties were forming a scheme to evade the Act?]

We do not object to its being read; it really does not alter the case. The case of *Bear* v. *Bromley* (2) follows *Reg.* v. *Whitmarsh* (3), and shews that a power to do something which, if it were one of the principal objects of the company, would make it a trading company, has not that effect when it is a mere incidental power to be exercised in exceptional circumstances. *Moore* v. *Rawlins* (4) is similar, and the powers there were such as to make the case one much more favourable to holding the association to be a trading association than here. All argument that this case is within the Lottery Acts is precluded by the decision of the House of Lords in *Wallingford* v. *Mutual Society* (5).

(1) 11 Ch. D. 170.
(2) 18 Q. B. 271.
(3) 15 Q. B. 600.
(4) 6 C. B. (N.S.) 289.
(5) 5 App. Cas. 685.

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Ince, Q.C., and *C. B. McLaren*, for the Respondent:—

The statute provides that no association shall be formed of more than twenty persons for the purpose of carrying on any business that has for its object the acquisition of gain by the association or the individual members thereof. This is an association, for a number of persons have associated themselves for a common object. They are virtually parties to the deed, for the covenantee is made a party to it on their behalf. They are parties joining in a common contract.

[BRETT, L.J.:—The Act says, "No company, association, or partnership." Association there must mean something in the nature of a company or partnership.]

The word is put in to include something which could not be called a company or partnership.

[JAMES, L.J.:—There is no contract between the certificate holders *inter se*.]

Without that there is a connection between them by the covenants entered into by the trustees with a covenantee, who acts for all the certificate holders.

[JAMES, L.J.:—Take the case of a club-house, built by means of debentures on the club property. Do you say that the debenture holders are an association?]

No, each debenture holder has got a separate security. Here the certificate holders combine in putting sums of money into the hands of trustees, that they may make a profit for them.

[JAMES, L.J.:—Take the case of one of the old trust deeds, under which a trader assigned his property to trustees in trust for his creditors. Do you say that the creditors who came in under it were an association?]

No, they only accepted a benefit. They did not come in and contribute their money for the purpose of constituting the concern. Here each contributor gets a share in the stock of the concern.

[JAMES, L.J.:—Suppose there had been no clause whatever authorizing any change of the stocks, do you say that if the trustees merely held specified stocks in trust to pay the contribu-

tors £6 per cent. interest and to apply the surplus for the benefit of the contributors, that would be a carrying on of business ?]

There is more than that in this case—there are the provisions for redemption. In the case put on the other side of a trust for a family, the persons to be benefited do not come together to set up the concern. Here they do, and so, as we contend, form an association, and it is for the purposes of gain, which is a wider word than "profit."

[BRETT, L.J. :—What is the "business" here ?]

The act of original investment, the putting out the money which the certificate holders contribute, and the management of the investments.

[BRETT, L.J. :—But do the certificate holders carry on that business ?]

Yes, the trustees invest as servants of the association. A portion of the business is trafficking in securities, though only under limited conditions.

[JAMES, L.J. :—Do you say that according to the true intent and meaning of this deed it was intended that the trustees should traffic in securities ?]

Yes, under certain circumstances.

[JAMES, L.J. :—Under certain circumstances almost every trustee is entitled to sell investments and change them for others. That, surely, is not trafficking.]

No, but we have not there the case of a number of persons joining together to authorize them to do it.

[BRETT, L.J. :—I do not follow that argument. Do you say that what would not be business if carried on by one person is business if carried on by a larger number ?]

The object of the thing must be looked at. A trustee changes investments, because one investment is better than another. Here it is made to secure a return for the money invested.

[JAMES, L.J. :—Can the certificate holders be held liable on contracts. Could anybody but the trustees be made liable for rent if the trustees did not pay it ?]

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We must admit that there would be great difficulty in suing any one but the trustees.

[JAMES, L.J.:—I doubt whether this association, as you call it, could have been registered.]

A body whose business it was to sell portions of their securities and reinvest them, surely might be registered.

[JAMES, L.J.:—It was not their business to sell them. They might sell them if an exceptionally high price could be obtained; but trafficking is not the object of the deed.]

Not the entire object, but one of the objects.

[JAMES, L.J.:—How could these holders of certificates, which may pass from hand to hand, be registered as shareholders?

COTTON, L.J.:—Suppose a partnership of seven persons, one of whom is a trustee for twenty-five others, is there an association of more than twenty persons within the Act?]

Yes, if the twenty-five associate themselves to contribute money and pay it to the trustee for the purpose of getting profit. There can be no reasonable interpretation of the words relating to gain by individual members, except by holding that the business may be carried on by some one else. As to the cases referred to. *Reg.* v. *Whitmarsh* (1) is inapplicable, for the words "or individual members" were no doubt inserted in the present Act to meet that case. *Bear* v. *Bromley* (2) was based on the same principle, that no profit was obtained from outsiders. In *Moore* v. *Rawlins* (3) the ground of decision was that no profit was made by the association. *Josephs* v. *Pebrer* (4) and *Duvergier* v. *Fellows* (5) are against the legality of this association. In the case of *In re Stanton Iron Company* (6), the late Master of the Rolls refused to recognise an association very similar to this as a company.

Speed, in reply.

(1) 15 Q. B. 600.
(2) 18 Q. B. 271.
(3) 6 C. B. (N.S.) 289.
(4) 3 B. & C. 639.
(5) 5 Bing. 248; 10 B. & C. 826; 1 Cl. & F. 39.
(6) 21 Beav. 164.

JAMES, L.J.:—

This case has been very fully argued, and we have had an opportunity of considering it since the time it was first argued before us. We therefore need not postpone our judgment.

With all deference to the very clear opinion of the Master of the Rolls, I cannot concur in the construction which he has put upon the 4th section of the *Companies Act*, 1862.

The Act was intended, as it appears to me, to prevent the mischief arising from large trading undertakings being carried on by large fluctuating bodies, so that persons dealing with them did not know with whom they were contracting, and so might be put to great difficulty and expense, which was a public mischief to be repressed. The enactment upon which the question before us turns is as follows:—"No company, association, or partnership consisting of more than twenty persons shall be formed after the commencement of this Act for the purpose of carrying on any other business" (that is to say, any business other than banking) "that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered," &c. Now there are three words there, "company, association, or partnership." I cannot understand what the difference is between a company and an association. The word "association," in the sense in which it is now commonly used, is etymologically inaccurate, for "association" does not properly describe the thing formed, but properly and etymologically describes the act of associating together, from which act of associating there is formed a company or partnership. But I believe that according to the vernacular we use on these subjects the difference which the Act intended to draw between a company or association and an ordinary partnership is this: An ordinary partnership is a partnership composed of definite individuals bound together by contract between themselves to continue combined for some joint object, either during pleasure or during a limited time, and is essentially composed of the persons originally entering into the contract with one another. A company or association (which I take to be synonymous terms) is the result of an arrangement by which parties intend to form a partnership which is constantly changing, a partnership to-day consisting of certain members and

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to-morrow consisting of some only of those members along with others who have come in, so that there will be a constant shifting of the partnership, a determination of the old and a creation of a new partnership, and with the intention that, so far as the partners can by agreement between themselves bring about such a result, the new partnership shall succeed to the assets and liabilities of the old partnership. This object as regards liabilities could not in point of law be attained by any arrangement between the persons themselves, unless the persons contracting with them authorized the change by a novation, or unless by special provisions in Acts of Parliament sanction was given to such arrangements.

The Act says that no company, association, or partnership consisting of more than twenty persons shall be formed after the commencement of this Act. For what? "For the purpose of carrying on any business"; and it is contended that the trust deed before us constitutes an association of more than twenty persons formed "for the purpose of carrying on business." I am unable to agree with the Master of the Rolls in the conclusion that it does. I cannot find that this deed constitutes any association whatever between the persons who are supposed to be *socii*. One man goes with £90 in his hands and buys from the trustees a £100 certificate with all the chance of profit attaching to it. Another man goes the next day and takes his £90 to the same people and gets from them another certificate, by which he gets a right to share in the funds which they have in their hands. The first man knows nothing of the second, and the second knows nothing of the first; they have never come into any arrangement whatever as between themselves. There never has been anything creating any mutual rights or obligations between those persons. They are from the first entire strangers who have entered into no contract whatever with each other, nor has either of them entered into any contract with the trustees or any trustee on behalf of the other, there being nothing in the deed pointing to any mandate or delegation of authority to anybody to act for the certificate holders as between themselves, and nothing, as it appears to me, by which any liability could ever be cast upon the certificate holders either as between themselves or as between themselves and anybody else. Therefore, I cannot arrive at the conclusion

that the certificate holders form an association within the meaning of this Act of Parliament, any more than the persons who subscribe for debentures in a railway, or the Bolivian bondholders (whose case was before us in *Wilson* v. *Church* (1)), or the creditors in *Cox* v. *Hickman* (2). Persons who have no mutual rights and obligations do not, according to my view, constitute an association because they happen to have a common interest or several interests in something which is to be divided between them.

But supposing that the certificate holders do constitute an association, it appears to me that it cannot, in any practical sense of the word "business," in any sense in which any man of business would use that word, be said that the association was formed for the purpose of carrying on any business, either by themselves or by any agent. I am unable to conceive any state of circumstances in which it could be averred that any contract had been made by or on behalf of the body of certificate holders, either by any member of themselves or by any other agent or manager for them. Now, people cannot be said to carry on business when it is utterly inconsistent with what they have done and with what they have said, and inconsistent with the nature of the whole transaction that they should be parties directly or indirectly, either by themselves or through any agent for them, to any contract, or be liable for any act of misfeasance or neglect of any manager, agent, or servant.

Again, if there is any business at all it is to be carried on by the trustees. Whatever is to be done is to be done by the trustees. Now, the Master of the Rolls appears, from his judgment, to have considered that these trustees were, in substance and in law, directors. With all deference to the Master of the Rolls, that appears to me a fallacy. To my mind the distinction between a director and a trustee is an essential distinction founded on the very nature of things. A trustee is a man who is the owner of the property and deals with it as principal, as owner, and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee, and who are his *cestuis que trust*. The same individual may fill the office of director and also be a trustee having property, but that is a rare,

(1) 13 Ch. D. 1. (2) 8 H. L. C. 268.

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exceptional, and casual circumstance. The office of director is that of a paid servant of the company. A director never enters into a contract for himself, but he enters into contracts for his principal, that is, for the company of whom he is a director and for whom he is acting. He cannot sue on such contracts nor be sued on them unless he exceeds his authority. That seems to me to be the broad distinction between trustees and directors.

Then, supposing that what is to be done here is to be done by the trustees, is what the trustees are to do under this deed the carrying on a business? In my opinion, nothing that is to be done under this deed by the trustees comes within the ordinary meaning of "business," any more than what is done by the trustees of a marriage settlement who have large properties vested in them, and who have very extensive powers of disposing of the investments, changing the investments, and selling them and reinvesting in other investments, according to their discretion and judgment, with or without the consent of their *cestuis que trust*. That is not a business. No doubt there is power in the 18th, 19th, and 20th clauses of this deed to dispose of the investments and reinvest in some similar securities with the assent of the certificate holders. This appears to me to be no more than the power of varying investments which you would find in an ordinary trust deed, the consent of some of the *cestuis que trust* being required. The deed appears to me to be merely a trust deed of property for investment, the investment being spread over a number of different securities so as to enable persons who choose to invest their money in this way to avail themselves of that which I believe is one of the most certain things in the world, viz., what is called the doctrine of averages, that is to say, that if a large number of different independent securities of a hazardous description are held together the loss upon some will be compensated by the gain on the others, so that a tolerably uniform average rate of interest will be obtained. The object, and the legitimate object, of the persons who were invited to join in this company was to have an investment of their money under such circumstances that they might look to have a high dividend with a very considerable security for the capital which they were investing in it. I can see nothing like an attempt at evading the Act or at doing anything but making

investments upon a large scale, so as to obtain the benefit of the doctrine of averages. Under those circumstances, I am of opinion that the judgment of the Master of the Rolls must be discharged and the action dismissed.

BRETT, L.J.:—

In this case it becomes necessary carefully to construe the Act of Parliament, and, in so doing, we must consider almost every word and almost every phrase in it, and we must translate, if possible, into the most accurate scientific form the idiomatic English which even in an Act of Parliament is often used, not in its strictly grammatical sense, but in a business sense.

The 4th section of the Act is in a negative form, and enacts that no company, association, or partnership, consisting of more than twenty persons, shall be formed for the purpose of carrying on any business that has for its object the acquisition of gain, unless it be registered. In order to come within this clause, there must be a joint relation of more than twenty persons for a common purpose, which common purpose, as it seems to me, must be the performing jointly a succession of acts. It will not be sufficient if the relation exists for a purpose which is to be completed by the performance of one act. Moreover, they must be so related together as to form a company, or a partnership, or an association. I confess I have some difficulty in seeing how there could be an association for the purpose of carrying on a business which would be neither a company nor a partnership, but I should hesitate to say that, by the ingenuity of men of business, there might not some day be formed a relation among twenty persons which, without being strictly either a company or a partnership, might yet be an association. But according to all ordinary rules of construction, if the association mentioned in sect. 4 is not, strictly speaking, a company or a partnership, it must be something of a similar kind. It must be a relation established between twenty persons or more "for the purpose of carrying on business," *i.e.*, in order that such company, association, or partnership may carry on the business. The business, therefore, whatever the word "business" may mean, is to be carried on by those twenty persons or more. The expression "carrying on" implies a repetition of acts,

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and excludes the case of an association formed for doing one particular act which is never to be repeated. That series of acts is to be a series of acts which constitute a business. Now, the word "business" might in a grammatical sense include things which no ordinary person would call a business, and, inasmuch as the Legislature could not particularize every kind of business which they intended to include, they have, in order to confine the meaning of that large word "business," stated that it is to be a business "that has for its object the acquisition of gain." The association, then, must be formed in order to carry on a series of acts having the acquisition of gain for their object.

We then come to deal with the expression "gain by the company, association, or partnership, or by the individual members thereof." It seems to me that that expression is to be taken distributively, according to the former description of the congregation of persons. Where it is a joint stock company, or a corporation, or *quasi* corporation, and the individuals are mere shareholders, then the gain which is acquired by the business is a gain by the company, and not a gain by the individual shareholders. But where it is an ordinary partnership, or where it is an association which, not being a joint stock company or corporation, is more like to a partnership, there the gain will be not by the whole body as distinct from the individuals, but by the individual partners.

But the mode in which the gain when obtained is to be distributed does not seem to me to be the real point in this case. The real question is, whether there is here any association of persons at all for the purpose of carrying on a business within the meaning of this section, and if so, then who are those persons.

This being my view of the construction of the statute, I cannot agree with the statement of the question by the Master of the Rolls in *Sykes* v. *Beadon* (1). He said that the point which he had to consider was whether there was an association or company formed for the purpose of gain either by the association or by the individual members thereof. But he omitted words which I think were purposely put into this statute for a definite object, namely, that the statute meant to deal, not with people who were asso-

(1) 11 Ch. D. 170.

ciated together for the purpose of obtaining gain, but with people who were associated together for the purpose of carrying on a business having for its object the acquisition of gain.

Let us now consider whether in the present case there were any persons associated for the purpose of carrying on any business such as is described in this clause. If there were such persons, they must have been either the trustees or the certificate holders. In my opinion neither the one nor the other were associated together for the purpose of carrying on such a business as is described in the Act. I will take first the trustees themselves. The trustees were not, as I construe the deed, to enter upon a series of acts which, if successful, would obtain a gain. They were joined together for the purpose of once for all investing certain money which was delivered into their hands, and not for the purpose of obtaining gain from a repetition of investments. In other words, they were not associated together for the purpose of speculating in shares. That was not their business. There was no reason why, when they had once made an investment, it should, under ordinary circumstances, ever be changed. Therefore it seems to me that the primary and substantial object of their associating together was not for the purpose of carrying on a business which, if successful, would result in the acquisition of gain. It is true that, under a special state of circumstances which is described in the 18th clause, it might be said that then what they would have to do under that clause and clause 20 might result in a gain. But even if a transaction under those clauses is to be considered as carried on for the purpose of gain, which I doubt, yet that is such a merely subsidiary part of the transactions described in the deed that it cannot be said to be a substantial part of what they have to do; and if the substantial part of what they have to do is not a business, a mere subsidiary provision will not bring them within the Act, as was decided in *Reg.* v. *Whitmarsh* (1) and several other cases. I am of opinion, therefore, that the trustees were not associated for the purpose of carrying on a business within the meaning of the clause; and if they were, they are nevertheless not within the clause because they are fewer than twenty.

I now come to the case of the certificate holders. It seems to

(1) 15 Q. B. 600.

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me that even if what had to be done under the deed was to be done by them by means of the trustees as their agents, nevertheless they were not associated for the purpose of carrying on such a business as is contemplated by the 4th section, inasmuch as what was to be done under the deed did not constitute such a business.

But supposing that this was such a business as is mentioned in the Act, were the certificate holders the persons who were to carry it on? It seems to me that they certainly were not. I take it that the persons called trustees in the deed are clearly trustees as distinguished from agents and from directors. The distinction has been pointed out by my Lord, and I entirely agree with it. If, indeed, although they were called trustees, the duties which they had to perform were really those of directors, then, although they were called trustees, the legal effect of the deed would be that they would be directors, and if they are directors they are agents; but here it seems to me clear that according to the true construction of the deed they were not directors or agents, but trustees. If that be so, the certificate holders, even if they were associated at all, were not associated for carrying on the business. It was not their business. They could not have been made liable for any contract made by the trustees. It was of course urged that they would be liable as undisclosed principals. But that assumes that the persons who made the contracts upon which they are to be liable are their agents authorized to bind them by their contracts, which is obviously not true. Therefore, even if there be here a business within the meaning of the section, yet it is not carried on by the certificate holders, who are of a larger number than twenty, but by the trustees, who are not of the number of twenty or more; and therefore in either view the case is not within the statute.

That being so, I venture with great deference to differ from the Master of the Rolls in this case, as also from his decision in *Sykes* v. *Beadon* (1). As regards the case of the *Arthur Average Association* (2), it is not perhaps absolutely necessary to determine whether the case of a mutual assurance association is within the statute or not, but I cannot help saying that the reasoning which brings me to the conclusion that the present case is not within the statute, appears to me to lead to the same conclusion with regard

(1) 11 Ch. D. 170. (2) Law Rep. 10 Ch. 542.

to a case of mutual assurance. I am inclined to think that no transaction within the association or company between the members of it can be taken into consideration in order to determine whether the company or association was one formed to carry on a business within the meaning of this section.

COTTON, L.J. :—

What we have to determine in this case is whether there is an association, company, or partnership within the meaning of the Act of 1862. In my opinion the question turns on sect. 4 of that Act. Sect. 21 has been referred to, but I do not think that it has any material bearing on the question we have to consider, because the companies which are referred to in sect. 21 might register under sect. 6 of the Act. What we have to consider is not whether the persons under this trust deed, as I call it for the sake of shortness, could register under the Act, but whether they are bound to do so, and in default are an illegal association.

As sect. 4 has been fully discussed, I will not repeat its terms, but in order to arrive at the construction of the particular portion of the section upon which the question turns it is material to observe that it begins with a restriction as to companies carrying on a well-known business, the business of banking. Then comes a clause upon which the question turns, which is to apply to companies other than banking companies, with certain exceptions. We have in the first part, without any reference to gain or anything else, a description of the business which companies in the first part of it are formed to carry on. Then in the second part we have a reference to companies carrying on any other business, with this qualification, that the business must be one for the acquisition of gain by the company, association, or partnership, or by its members. That, in my opinion, shews that the words "for the purpose of carrying on any business which has for its object the acquisition of gain" are material, and that the section cannot properly be read as saying "any other association having for its object the acquisition of gain." In my opinion there must be a company, association, or partnership, which is formed for the purpose of carrying on a business by itself or its agents. If it is formed for the purpose, it must register if it is within the Act.

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Then the nature of that business is defined: it must be a business having for its object the acquisition of gain by the company or its members. I do not think it very material to consider how far the word "association" differs from company or partnership, but I think we may say that if "association" is intended to denote something different from a company or partnership, it must be judged by its two companions between which it stands, and it must denote something where the associates are in the nature of partners. It seems to me (not that I think it material) that it might have been intended to hit the case which we have frequently seen, of a number of persons or a number of firms joining themselves together for the purpose of carrying on a particular adventure in order to make gain by it, as is very common where firms, one in *London*, another in *Liverpool*, and another in the *East Indies*, join together in one or more adventures, the one to carry on the one part of the business, and the other to carry on the other. But, whatever may have been the object of using the word "association," what we have to consider, in my opinion, is whether this conglomeration, as I will call it, of the persons who subscribe their money under this trust deed, is an association formed to carry on any business within the meaning of this section having for its object the acquisition of gain.

But, before giving my view as to that, I will state what I consider to be the effect of this deed. As I understand it, this is a scheme for enabling a large sum of money provided by various persons to be invested on a large aggregate of securities of different companies of a particular class, an aggregate including the securities of so many companies as to give a fair average in that particular class of security. It is obvious, then, upon the doctrine of averages referred to by Lord Justice *James*, that as they are securities which as a whole produce large profits, though some of them might not produce profit, yet if they were taken in a large number of companies there would in the result be a large yearly sum to be divided from the income of the aggregate of the investments, and when the capital comes to be divided the average result will be that the money of the contributors will be returned with a profit. That was the principle of the scheme. The investments were made in the names of trustees for a large number of

contributors. It was necessary to make provision for their conduct as to how decisions were to be come to by that body as to what was to be done with regard to the general business of the trust, and moreover it was incident to the trust that there should be sometimes a change of investment. That is incidental to every trust, and is provided for in ordinary trusts, but here we have no doubt a provision which at first sight looks like carrying on a business. Clause 18 provides that under certain circumstances the securities may be sold, and then by clause 20 they may be re-invested. If it appeared that the real object of the deed was that the trustees should speculate in investments, even though confined to this particular class, the case would have stood in a very different position. In my opinion there is nothing of that sort. This is not a provision that they shall make a profit by selling and buying again securities of this class whenever, in their opinion, the turn of the market makes it advisable so to do. The deed is in substance a trust deed, providing how they are to hold as trustees specified securities of a large amount with provisions enabling them in certain events to sell some of the securities, and enabling them when that is done, but only under special circumstances, to reinvest, not to speculate. In my opinion that is not a deed providing for carrying on a business within the meaning of the Act, it is a deed providing for the holding trust property, with such provisions only as are necessary to enable that to be conveniently done. I am of opinion, therefore, that there is no carrying on business within the meaning of the Act.

But supposing that there is a business within the meaning of the Act, is there an association of more than twenty persons who are carrying it on by themselves or their agents? It was argued by Mr. *Ince* that the mere fact of these persons putting money, without any contract or communication with each other, into a bank to a common account to be invested by the trustees under the trusts of this deed, made them an association carrying on business for the purpose of gain. What I have already said as to the true construction of the 4th section shews that, in my opinion, that would not be carrying on business. They may do it for the purpose of profit, and most persons when they invest their money do it for the purpose of profit, that is to say, they expect

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to get a profit in the shape of dividends, and probably also expect that the investment will go up and will produce them a profit when hereafter they may wish to realize. But, in my opinion, what must be shewn is that the association by themselves or by their agents carry on a business. Now, here, how can that be said? That the certificate holders do it by themselves can, I think, hardly be contended. All the power which the subscribers of this money had was to attend sometimes at meetings, and the meetings which were held most usually are those mentioned in clause 26. The only business done at them was to receive and consider a report from the trustees on the condition and affairs of the trust, to appoint auditors to audit the accounts, and to elect new trustees to fill up vacancies. It is impossible, in my opinion, to say that the certificate holders are by themselves in any way carrying on any business by reason of what is done at these meetings. Then clause 20 says that a reinvestment must be sanctioned at a meeting of the certificate holders summoned for that purpose. I have already dealt with the point that under clauses 18 and 20 there is not a power to speculate or to carry on a business, and really all that is here given to the certificate holders is the power to give such assent as *cestuis que trust* usually give for a change of securities when they are not incapacitated by infancy or otherwise. Of course the number of *cestuis que trust* makes it necessary that that should be done in some way which will enable those who are actually present to bind those who are absent, to enable the majority to bind the minority, as otherwise the assent of the *cestuis que trust* could never be effectually obtained, and therefore a form is adopted similar to the provisions in articles of association as to meetings of shareholders, but that is only matter of form. They meet as *cestuis que trust* to give their assent, not as members of the partnership joining to carry on and control the business of the partnership, even if it were a business. Then, can it be said that they carry on a business by their agents? In my opinion that cannot be maintained. The trustees here are the only persons who are dealing with the investments, and they are dealing, not as agents for some principal, but as trustees in whom the property and the management of it are vested, and who have the power of changing the investments and securities. That

is just like the case which often occurs where the executors or trustees of a will are directed to carry on a business. The fact that they are to account to others for the profits made is a matter utterly immaterial as between them and those with whom they deal. They deal with those persons as the only persons contracting, and hold themselves out as personally liable. Those persons have no right whatever as against the persons beneficially entitled, nor, except possibly in the case of a testator having directed a part of his assets to be employed in the trade, have they any claim whatever against the assets of the testator. Those dealing with executors so carrying on a business deal with them as with any other persons carrying on business, and look to no one else, and even although the executors have a right of indemnity, if they act properly, that in no way affects or enlarges the contracts which they enter into with third parties. So far as there is any contract here to be entered into by the trustees it is only a change of investment; so far as there is any business to be carried on it is the business of the trustees, not as agents for principals behind, but their own business, that is to say, a business in which they contract as solely liable to outsiders, whatever may be their rights as against those for whom they are trustees. In my opinion, therefore, in this case the only alleged association of more than twenty, being the persons who have contributed their money, stand in this position, that they are not by themselves or their agents carrying on any business whatever. Therefore, in my opinion, this cannot be said to be an association prohibited by the Act. Of course if the trustees are carrying on a business for the purpose of profit, as they are not twenty in number there could be no objection under the Act to their doing so.

In my opinion the view which the Master of the Rolls took of this section of the Act of Parliament cannot be maintained, and the action must be dismissed.

Solicitors: *Ashurst, Morris, Crisp, & Co.; Baxters & Co.*

C. A.
1880
July 10, 17.

In re SMYTH (A LUNATIC).

Lunatic—Practice—Order to inspect Documents by a Person claiming under a deceased Lunatic.

According to the practice in Lunacy the Court will order production of all documents in the custody of the Master or Registrar relating to the estate of a deceased lunatic on the application of a person claiming under him. But he must make out a *primâ facie* title to the estate.

G. E. SMYTH was found to be a lunatic in the year 1834, and certain affidavits, deeds, and documents relating to his pedigree and real estate were deposited with the Master, and others with the Registrar in Lunacy.

In the year 1878 the lunatic died intestate, and an action was commenced in the Exchequer Division of the High Court of Justice between two rival claimants for the lunatic's real estate. The main issues in the action turned on the pedigree of the lunatic, and on the question whether the descent ought to be traced *ex parte paternâ* or *ex parte maternâ*.

The Plaintiff now presented a petition asking that he and his solicitors and agents might be permitted to examine and take copies of, and extracts from, the affidavits, deeds, and documents in the offices of the Master and Registrar, and that the same might be produced on the trial of the action.

The Defendant was served with the petition, but did not appear.

The Plaintiff's solicitor, the Plaintiff being abroad, filed an affidavit swearing that the production of the documents was necessary for the establishment of the Plaintiff's case.

Yate Lee, for the Petitioner, referred to *In re Wood* (1). That case only in terms related to the proceedings in the lunacy, but the Court had jurisdiction to make the order as to all documents in the custody of the Court.

COTTON, L.J.:—

It is not the practice in Lunacy to make such an order in favour

(1) 4 D. J. & S. 134.

C. A. 1880 *In re* SMYTH (A LUNATIC).

of an applicant unless he shews a *primâ facie* title to the property of the lunatic. The report of *In re Wood* (1) is clear on that point. The Petitioner's solicitor must make a further affidavit verifying the Petitioner's title.

July 17. This having been done, the Court made the order asked for; but as the Defendant did not appear, no order was made as to costs.

Solicitors: *Peacock & Goddard.*

MASON *v.* BRENTINI.

C. A. 1880 *July* 21.

[1878 M. 319.]

Costs—Apportionment of Costs—Claim dismissed—Counter-claim dismissed.

Where the Plaintiff's claim and the Defendant's counter-claim are both dismissed with costs, the Plaintiff is to pay to the Defendant the general costs of the action, and the Defendant is to pay to the Plaintiff only the amount by which the costs have been increased by reason of the counter-claim.

Saner v. *Bilton* (2) approved.

BY the judgment in this action both the claim and counter-claim were dismissed with costs, and a set-off of costs was directed.

The Taxing Master taxed the costs of the claim at £350, and and gave £10 10*s.* as the costs of the counter-claim.

The Plaintiff carried in objections to the taxation, which were in part as follows:—

"The Plaintiff objects for the following reasons to the allowance of the following items:—

"1. All items in the Defendant's bill of costs which relate and are common to the action and counter-claim.

"(*a.*) Because both the action and counter-claim were dismissed, and a set-off of costs ordered, and although it is admitted that the Defendant is entitled to all costs which exclusively relate to the action, and that the Plaintiff is entitled to all costs which exclu-

(1) 4 D. J. & S. 134. (2) 11 Ch. D. 416.

C. A. 1880 MASON v. BRENTINI.

sively relate to the counter-claim, there are numerous charges which do not relate exclusively to one or the other, but which are common to both. All such common charges have been allowed to the Defendant by the Taxing Master, whereas it is objected that he is only entitled to be allowed such proportion thereof as the Taxing Master may think, as between action and counter-claim, are fairly attributable to the action, in which alone he succeeded.

"(*b.*) Because if the reverse were to be decided a defendant would be entitled practically to set up and try an unfounded counter-claim at the plaintiff's expense, the charges which relate exclusively to a counter-claim being comparatively insignificant, although the general charges common to both action and counter-claim may be considerably increased by such counter-claim.

"(*c.*) Because under Order XIX, rule 3, it is provided that a counter-claim shall have the same effect as a cross-action, which is superseded, and upon taxation of costs of an action and cross-action charges common to both were, by the established practice in the Taxing Master's office, always apportioned between them."

The Taxing Master answered:—

"This objection is overruled. The case of *Saner* v. *Bilton* (1) decides that in such cases the plaintiff should pay to the defendant the general costs of the action, and the defendant should only pay to the plaintiff the amount by which the costs have been increased by reason of the counter-claim."

Vice-Chancellor *Malins* having refused to refer the matter back to the Taxing Master on this head, the Plaintiff appealed.

Glasse, Q.C., and *E. Cutler*, for the Appellant:—

By Order XIX., rule 3, a counter-claim is to have the same effect as a cross-action, and under the old practice in the taxation of costs of a suit and cross-suit we should have been entitled to an apportionment of the costs common to both actions. *Heighington* v. *Grant* (2) is in our favour.

[JESSEL, M.R.:—The case of a plaintiff bringing forward two demands, and failing on one and succeeding on the other, appears to me to have no analogy to the present case.]

(1) 11 Ch. D. 416. (2) 1 Beav. 228.

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Begbie v. *Fenwick* (1) also proceeds on the principle of apportionment.

[JESSEL, M.R.:—That also was a case where a suit failed in part and was successful in part.]

The rule in *Saner* v. *Bilton* (2) is not in accordance with the old principles.

[*Knight* v. *Pursell* (before Vice-Chancellor *Bacon* on the 15th of November, 1879) was also referred to.]

Higgins, Q.C., and *Langworthy*, *contrà*, were not called upon.

JESSEL, M.R.:—

I entirely agree with the decision of Mr. Justice *Fry* in *Saner* v. *Bilton*, and for the reasons which he has given; and am of opinion that his judgment is to be considered as expressing the rule of the Court.

23 Ch D 391

JAMES and BRETT, L.JJ., concurred.

Solicitors: *John Hill; Cronin & Rivolta.*

Ex parte BUXTON. *In re* MÜLLER.

C. A.
1880
July 22.

Lease of Bankrupt—Equitable Mortgagee—Assignment by Trustee—Right of Trustee to Indemnity—Disclaimer—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 23.

When the trustee of a bankrupt desires to disclaim a lease which the bankrupt has deposited by way of equitable mortgage, he will not be allowed to do so to the prejudice of the mortgagee, but if he assigns the lease to the mortgagee, the latter must covenant to indemnify him against liability under the lease.

Wilkins v. *Fry* (3) considered.

6 QBD 370
17 Ch D 746
763
40 S D 32

THIS was an appeal from an order made by Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy, giving leave to the trustee in the liquidation of *John Müller* to disclaim within four-

(1) Law Rep. 6 Ch. 869. (2) 11 Ch. D. 416.
(3) 1 Mer. 244.

C. A. 1880

Ex parte BUXTON. *In re* MÜLLER.

teen days all his interest in the property comprised in a lease, dated the 5th of July, 1879, to the debtor of the business premises which had been occupied by him.

The debtor had, on the 1st of February, 1880, deposited the lease with *S. C. Buxton* to secure the repayment of moneys advanced by him to the debtor. Notice of the application for leave to disclaim was served on the lessors and on *Buxton*. *Buxton* opposed the making of the order. He desired to have an assignment of the lease from the trustee, and the trustee was willing to execute an assignment to him, but required that *Buxton* should indemnify him against liability on the covenants in the lease, and should pay a quarter's rent which was due. *Buxton* insisted that he was not bound to indemnify the trustee. The lessors were willing to accept *Buxton* as a tenant. Pending the hearing of the appeal, the Court of Appeal had granted an injunction to restrain the trustee from executing the disclaimer. By his notice of appeal the Appellant asked that the trustee might be authorized and directed to assign all the interest acquired by him as trustee in the property comprised in the lease to *Buxton*.

Winslow, Q.C., and *Leeke*, for the Appellant:—

The effect of the order is to destroy the Appellant's title. The trustee is trustee for the secured creditors as well as for the unsecured; he is bound not to exercise his power in such a way as to destroy the security of an equitable mortgagee: *Lingard* v. *Bromley* (1).

[*E. Cooper Willis*, for the trustee:—

The trustee is willing to assign the lease to the Appellant on his indemnifying him in the usual way against liability on the covenants in the lease. We made this offer before the Registrar.]

A trustee in bankruptcy when he assigns a lease of the bankrupt is not entitled to any indemnity from the assignee: *Wilkins* v. *Fry* (2); *Davidson's* Conveyancing (3). There is the further question who is to pay a quarter's rent which is now due. It is an important question what is the position of an equitable mort-

(1) 1 V. & B. 114. (2) 1 Mer. 244.
(3) 2nd Ed. vol. ii. p. 425.

gagee of a lease of a bankrupt when the trustee in the bankruptcy wishes to disclaim the lease.

[JAMES, L.J.:—Of course the trustee would not be allowed by his disclaimer to affect the rights of an equitable mortgagee. The question is only on what terms the trustee is to assign the lease.]

C. Lyttleton Chubb, for the lessors.

JAMES, L.J.:—

If the equitable mortgagee intercepts the trustee's right to disclaim, a right which is given to him by statute subject to the equitable rights of other persons, he must, like any other person who claims the property, take it on the usual terms, *i.e.*, he must covenant to indemnify the trustee against liability under the lease. The trustee will not get the benefit of a disclaimer; he will assign as a continuing lessee up to the time of the assignment, and as he will thus retain a liability which he would otherwise have got rid of, the assignee must indemnify the trustee against the consequences of his retaining the lease up to the date of the assignment. The Appellant must pay the quarter's rent which is due. The assignment will be at his expense, and he must pay the costs of the appeal.

BRETT and COTTON, L.JJ., concurred.

Solicitors for Appellant: *Winter & Co.*
Solicitors for Trustee: *Goldberg & Langdon.*
Solicitors for Lessors: *Deane, Chubb, & Co.*

C. A.
1880
July 22.

Ex parte WARD. *In re* WARD.

Adjudication of Bankruptcy—Application to annul—Parties to be served—Appeal—Time—Rules of Court, 1875, *Order* LVIII., *rr.* 9, 15.

16CD542

Notice of an appeal from the refusal to annul an adjudication of bankruptcy must be served on the trustee in the bankruptcy as well as on the petitioning creditor.

And if notice of the appeal is served on the petitioning creditor in time, but is not served in time on the trustee, the appeal must be dismissed.

The time for appealing will not be extended in such a case.

THIS was an appeal from the refusal of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy, to annul an adjudication of bankruptcy which had been made against *Robert Ward*.

The application to annul was refused on the 18th of June, 1880. The debtor served a notice of appeal on the petitioning creditor, but did not serve any notice on the trustee who had been appointed in the bankruptcy. The trustee had not been served with notice of the application to annul. The appeal came on to be heard by the Court of Appeal on the 15th of July, 1880.

Winslow, Q.C., and *Herbert Reed*, for the Appellant.

S. Woolf, for the petitioning creditor, objected that the trustee ought to have been served with notice of the appeal.

JAMES, L.J.:—

The trustee ought to have been served. After the adjudication has been made the petitioning creditor is not the only person interested in the matter; the adjudication enures to the benefit of all the creditors. The hearing of the appeal must stand over for a week to enable you to serve the trustee.

BRETT and COTTON, L.JJ., concurred.

The Appellant served notice of the appeal on the trustee on the 17th of July. The appeal came on again for hearing on the 22nd of July.

Winslow, Q.C., and *Herbert Reed*, for the Appellant.

E. Cooper Willis, for the trustee, objected that the notice had been served on the trustee too late. The order appealed from being a simple refusal, the twenty-one days for appealing ran from the day when the order was pronounced, and expired on the 9th of July: Rules of Court, 1875, Order LVIII., rr. 9, 15; *Ex parte Viney* (1); *Ex parte Saffery* (2).

Winslow, Q.C., and *Herbert Reed*, for the Appellant:—

The petitioning creditor is the proper person to support an adjudication; it is his adjudication, and he is the essential person to support it.

[JAMES, L.J.:—He has no more interest in it than any other creditor; the adjudication is for the benefit of all the creditors.]

If necessary we ask for special leave to appeal as against the trustee, notwithstanding the expiration of the twenty-one days. He is actually here now. He was not served with notice of the application in the Bankruptcy Court.

S. Woolf, for the petitioning creditor.

JAMES, L.J.:—

I do not think it is a case in which we ought to extend the time. The trustee was within his legal right in objecting that he had not been served with the notice in time. The petitioning creditor was quite right in taking the objection that the trustee was not before the Court. I should have taken the objection myself if I had seen that he was not. He is an essential party to the appeal. The late Lord Justice *Knight Bruce* used always to inquire who had been served with notice of an appeal. The appeal will be dismissed with costs to the extent of the deposit.

BRETT and COTTON, L.JJ., concurred.

Solicitor for Appellant: *H. Aird.*
Solicitors for Trustee: *Lumley & Lumley.*
Solicitors for Petitioning Creditor: *Gush & Phillips.*

(1) 4 Ch. D. 794. (2) 5 Ch. D. 365.

C. A.
1880
M. R.
April 19, 24.
C. A.
July 26, 27.

PALMER *v.* LOCKE.

[1879 P. 250.]

Power—Testamentary Appointment—Bond to appoint a certain Sum by Will—Fraud on Power.

A father, who had a limited power of appointment over a fund by will only, among his children, made a will by which he appointed a sum of £5000 to his son *J.*, and the remainder among his other sons. A few weeks afterwards he executed a bond binding himself that his son *J.* should receive, either out of his own property or out of the fund subject to the power, the sum of £5000 at the least. The father died without revoking his will:—

Held (affirming the decision of *Jessel*, M.R.), that the appointment was valid.

Coffin v. *Cooper* (1) followed.

Held, also, by *Brett*, L.J. (*dubitante Cotton*, L.J.), that a bond or covenant by the donee of a limited testamentary power that he will exercise it in a particular way is entirely void.

JUDAH GUEDALLA, by his will, dated the 21st of December, 1839, gave his residuary personal estate to three trustees upon trust to sell and convert the same and to hold the proceeds, as to one third part thereof, upon the trusts therein declared during the life of his son *Moses Guedalla*, and after his death upon trust for his wife during her life, and after the death of the survivor in trust for such of the children of his said son *Moses* by his present or any future wife, or the issue born in his lifetime of such children, with such provisions for their maintenance, and at such ages and lawful times, and upon such conditions as his said son *Moses* by his last will or any codicil thereto should direct or appoint; and in default of such direction or appointment, and so far as the same, if incomplete, should not extend, in trust for all the children of his said son *Moses* who should attain the age of twenty-one years or marry under that age.

Judah Guedalla died in 1858.

Moses Guedalla had six children, one of whom was *Joseph Guedalla*.

Moses Guedalla made his will, dated the 4th of January, 1873,

(1) 2 Dr. & Sm. 365.

and thereby, after reciting the power of appointment given to him by his father's will, in exercise of the said power directed that the trustees or trustee for the time being of his father's will should out of the said third part of the residuary estate pay to his son *Joseph Guedalla* £5000, and appointed the remainder of the third part to his other children in different proportions.

On the 19th of February, 1873, *Moses Guedalla* executed a bond for £5000 to his son *Joseph Guedalla*, in which he recited the power of appointment contained in *Judah Guedalla's* will, and that he intended to appoint or give, or had appointed or given, by will or codicil pursuant to the recited will or otherwise, the sum of £5000 at the least to his said son *Joseph Guedalla*, either out of the property subject to the recited will or the property of the said *Moses Guedalla*, and by way of making the said *Joseph Guedalla* entitled in any event to that sum on the death of the said *Moses Guedalla*, either in possession or in reversion on the death of his present wife, the said *Moses Guedalla*, by way of advancement for his son and to forward his prospects in life, had determined and agreed to execute the above written bond. The condition of the bond was that it should be void if *Moses Guedalla* should by his last will or any codicil thereto appoint or give the sum of £5000 at the least to *Joseph Guedalla* absolutely, either under the recited will of the said *Judah Guedalla* or out of the property of the said *Moses Guedalla*, subject only to the life interest of his present wife; and if such sum, or any part thereof, should be given out of the property of the said *Moses Guedalla*, then if such property should be sufficient to make good the same; or if the said *Joseph Guedalla* should on the decease of *Moses Guedalla* become entitled in default of appointment or otherwise to such sum under the said recited will.

On the 23rd of April, 1873, *Joseph Guedalla* mortgaged his interest under *Judah Guedalla's* will to *George Gilliam* for £600, with a power of sale in case of default of payment.

Moses Guedalla died on the 24th of September, 1875. His widow was still living.

By subsequent assignments the reversionary interest of *Joseph Guedalla* became vested in the Plaintiffs, and they put it up for sale by auction on the 1st of May, 1879, when it was purchased

C. A. 1880 PALMER v. LOCKE.

by the Defendants for £2000. Difficulties having arisen respecting the title to the property sold, the Plaintiffs brought the present action, claiming specific performance of the contract for sale.

The Court directed a reference as to the title, and the conveyancing counsel of the Court to which it had been referred reported that a good title could not be made, on the ground that the appointment made by the will of *Moses Guedalla* was in discharge of his own personal liability under his bond, and was void on the authority of *Sugden* on Powers (1); *Reid* v. *Reid* (2); *Duke of Portland* v. *Topham* (3).

The Chief Clerk having certified in accordance with this opinion, the Plaintiffs took out a summons to vary the certificate, which was adjourned into Court.

The summons came on to be heard on the 19th of April, 1880.

Chitty, Q.C., and *B. B. Rogers*, for the Plaintiffs, contended that the appointment made by the will of *Moses Guedalla* was valid, and that therefore the Plaintiffs could make a good title.

They cited *Thacker* v. *Key* (4); *Davies* v. *Huguenin* (5); *Bulteel* v. *Plummer* (6); *West* v. *Berney* (7); *Stuart* v. *Castlestuart* (8); *Coffin* v. *Cooper* (9).

Davey, Q.C., and *Armistead*, for the Defendants, *contrà*, cited *Smith* v. *Death* (10).

[JESSEL, M.R., referred to *Smith* v. *Houblon* (11) and *Cunynghame* v. *Thurlow* (12).]

JESSEL, M.R.:—

I decide this case simply on authority; and the most singular part of it is that I concur so much in the reasoning of the decision in *Coffin* v. *Cooper*, which I am bound to follow, that it makes it, if I may say so, more obligatory on me to follow that authority, because that case, which was decided in the year 1865

(1) 8th Ed. p. 615.
(2) 25 Beav. 469.
(3) 11 H. L. C. 54.
(4) Law Rep. 8 Eq. 408.
(5) 1 H. & M. 730.
(6) Law Rep. 6 Ch. 160.
(7) 1 Russ. & My. 431.
(8) 8 Ir. Ch. Rep. 408.
(9) 2 Dr. & Sm. 365.
(10) 5 Madd. 371.
(11) 26 Beav. 482.
(12) 1 Russ. & My. 436, n.

by Vice-Chancellor *Kindersley*, lays down what appears to me the true principle which should govern Courts of Equity in cases of this kind so clearly and forcibly that I think I should only diminish instead of adding to the weight of that judgment by any observations of my own. But in that case, even in the then state of the authorities, the Vice-Chancellor thought he was compelled to decide against his own opinion of what the true principle was; and he actually decided that a covenant by a lady to make an appointment in favour of her son for the very purpose of enabling him to borrow money, although the appointment was to be testamentary, was a valid covenant which would render her estate liable in damages, and that if she made the appointment in pursuance of the covenant, so as to exonerate her estate from that liability to damages, the appointment was a valid appointment. Now there is no possible distinction worth considering between the present case and the case of *Coffin* v. *Cooper* (1). Of course, it makes no real difference whether the case is one of a bond or a covenant. You can recover under the bond only the actual damages sustained; though if the amount of damages exceeds the amount of the penalty, you can recover no more than the penalty.

Then it is suggested that the bond here was only defeasible in case the obligor paid the amount out of his own property; but so it would have been if he had not said so. If it was only defeasible as it was in *Coffin* v. *Cooper* you could only have got the amount of damages sustained, and if the estate of the covenantor or obligor had paid damages the covenant or bond would have been got rid of. So that the provision or condition that if the money is paid the covenant or bond shall be void makes no difference, because in no case can you recover under the covenant or bond more than the amount of the damages sustained. The present case is, to my mind, utterly undistinguishable from that of *Coffin* v. *Cooper*. It makes no difference whether or not it is expressed in terms that the payment out of the obligor's own estate shall or shall not satisfy the bond.

That being so, and finding the exact point decided by Vice-Chancellor *Kindersley*, as I said before, so long ago as 1865, and that case not having been disturbed since in any way, and finding

(1) 2 Dr. & Sm. 365.

C. A. 1880 PALMER v. LOCKE. M. R.

that the decision was based upon the then state of the authorities —which it is unnecessary for me to examine again—I think it is impossible for a Court of first instance to say that that decision was erroneous. But I must also mention that the matter came before the Court of Appeal in 1870 in *Bulteel* v. *Plummer* (1), where Lord *Hatherley*, who was then Lord Chancellor, states most distinctly his concurrence in the decision of Vice-Chancellor *Kindersley;* and I concur in his opinion. In fact, Lord *Hatherley* says this (2): "To hold such an appointment bad as a device would be to strain the doctrine as to improper appointments too far." If the decision of the Vice-Chancellor needed confirmation or approval, we have it in this *dictum* of the Lord Chancellor in *Bulteel* v. *Plummer*.

Therefore I must decide in favour of the Plaintiffs, and hold that the appointment was valid.

C. A.

From this decision the Defendants appealed. The appeal came on to be heard on the 26th of July.

Davey, Q.C., and *Armistead*, for the Appellants:—

The appointments by will and the bond were all one transaction, and were both void. There may be cases which shew that the donee of a testamentary power may release the power, but the Court will not extend that doctrine; and it has never been held that the donee can bind himself by a covenant to exercise the power in a particular way. In *Coffin* v. *Cooper* (3) and *Davies* v. *Huguenin* (4), the authorities which the Master of the Rolls followed, it was held that the covenants operated as releases of the power. But no such case arises here. The donee of the power attempted to bind himself to execute the power in a particular way, and in doing so he committed a fraud on the power in two ways. In the first place, he attempted to make an absolute appointment during his lifetime, which he was not authorized to do, as the power was testamentary only, and it was intended that his discretion should remain till his death. In this sense the power was fiduciary, and he had no power to bind that discretion

(1) Law Rep. 6 Ch. 160.
(2) Ibid. 163.
(3) 2 Dr. & Sm. 365.
(4) 1 H. & M. 730.

even by a moral obligation. In the second place, he attempted to execute the power in such a way as to benefit his own estate, for the effect of the appointment would be to relieve the liability under which he had entered by the bond: *Sugden* on Powers (1); *Hurst* v. *Hurst* (2); *Duke of Portland* v. *Topham* (3); *Thacker* v. *Key* (4); *Stuart* v. *Castlestuart* (5); *Bulteel* v. *Plummer* (6); *Wilson* v. *Piggott* (7); *Reid* v. *Reid* (8); *Smith* v. *Death* (9). There is on the whole transaction a strong suspicion that there was a bargain between the father and the son, and that it was devised for the purpose of enabling the son to raise money on his share.

Chitty, Q.C., and *B. B. Rogers*, for the Plaintiffs, were stopped by the Court.

JAMES, L.J.:—

I am of opinion that the decision of the Master of the Rolls must be affirmed. He found himself bound by the decision of Vice-Chancellor *Kindersley* in *Coffin* v. *Cooper* (10), and Vice-Chancellor *Kindersley* was rightly bound by what he considered to be, and what I consider to be, the common course of decision, which really prevented this point from being successfully raised. It had been decided in various cases that such a power as this could be released, because, although in some sense it is fiduciary, it is fiduciary only to this extent, that the donee of the power cannot use it for any corrupt purpose, cannot use it for any purpose of benefiting himself or oppressing anybody else. This was so decided in the case of the *Duke of Portland* v. *Topham*; and it is sufficient to say that I agree with what Lord Chancellor *Hatherley* said, that to hold that such an appointment as this is void because there has been a deed of covenant executed previously, would be to strain the doctrine of improper appointment beyond anything which the cases require. In my opinion, it

(1) 8th Ed. p. 527.
(2) 16 Beav. 372.
(3) 11 H. L. C. 32.
(4) Law Rep. 8 Eq. 408.
(5) 8 Ir. Ch. Rep. 408.
(6) Law Rep. 6 Ch. 160.
(7) 2 Ves. 351.
(8) 25 Beav. 469.
(9) 5 Madd. 371.
(10) 2 Dr. & Sm. 365.

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would be to strain it most improperly, and in effect to shake a great number of appointments which I have not the slightest doubt have been considered sound both before and since the decision of Vice-Chancellor *Kindersley*.

With regard to the other point, it seems to me that you cannot act upon suspicion. It is said the will made in January was void by reason of a bond made six weeks afterwards, and it is supposed there was some corrupt bargain between father and son, of which there is not the slightest trace, and which you may as well suppose in every case where there is a testamentary appointment made. It may be said, "How do you know he was not bribed? How do you know that there was not some corrupt object?" In the absence of some ground for supposing it, we must assume everything was done rightly, otherwise the result would be that every disposition made under a power, whether testamentary or otherwise, given to a father for his children would be laid under suspicion when the father is dead, for it would be almost impossible to prove that there was not some bargain between them. I am of opinion the decision ought to be affirmed, and the appeal must dismissed with costs.

BRETT, L.J.:—

I should have thought it very dangerous, unless there were some principle very clearly outraged, to overrule the decision of *Coffin* v. *Cooper* (1), which was decided so long ago, and which has probably been acted upon; but I confess that it seems to me that, according to principle, the case of *Coffin* v. *Cooper* was right. To my mind it does not make any difference whether the covenant in this case was entered into before or after the will was executed. If I thought that the covenant was binding upon the person who entered into it, I should have felt some difficulty, because then it might be said, and truly said, as it seems to me, that the exercise of the appointment would be an exercise made to the advantage of the person making it, that is to say, that the effect of it would be to relieve his estate from an obligation into which he had entered. But I must confess that I agree entirely with the view which was taken by Lord Justice *James* in *Thacker*

(1) 2 Dr. & Sm. 365.

v. *Key* (1), that such a covenant as is here in question, and as was in question in *Coffin* v. *Cooper* (2) is a wholly void covenant, and that no remedy could be had upon that covenant against the covenantor. If a consideration was given for the covenant, then it is admitted by everybody that it would be absolutely fraudulent, and, if fraudulent, it would be of course void, because both parties are parties to the fraud. It seems to me that although there is no consideration given for the covenant it is not a binding covenant, because it would be contrary to public policy to allow a person in the position of a trustee to enter into such a covenant so as to bind himself. And if the covenant is a void covenant, then what is the fetter which is put upon the exercise of the power of appointment which has been delegated to the donee of the power? Under those circumstances there is no fetter at all, unless it be said that a bare promise which cannot be enforced, a moral obligation, as it is called, to keep a bare promise, is such a fetter. Now the law, at all events, does not recognise that there is any fetter in a bare promise, and I can see none really; and if you take it to be a bare promise and not an effective covenant, then I should absolutely agree with what Lord Justice *James* has before said, and which was adopted by Lord *Hatherley*, namely, that it would be far too great a strain to say that a mere bare promise is to be considered a fetter upon the power of appointment, because there is a kind of moral obligation to keep the promise. I confess myself I do not think there is any such moral obligation as is asserted; I think the morality of the thing is in favour of the breach of such a promise rather than in favour of keeping it. Therefore, for these reasons, both upon principle and authority, it seems to me that there is no objection to the exercise of the appointment because of the existence of the void covenant. It was suggested that by so holding we should destroy the effect of these powers of appointment. It seems to me absolutely the contrary. We give them the greatest possible effect, because we say that no such covenant as this can prevent the exercise of the power of appointment, that is to say, that the person who has entered into such a covenant may, without any risk, exercise his discretion up to the last day of his life. If such a covenant as

(1) Law Rep. 8 Eq. 408. (2) 2 Dr. & Sm. 365.

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this were held to be a release, then the former decisions with regard to release might be a considerable difficulty in the way, but it seems to me that it cannot possibly be said that such a covenant as this is a release. As to the case of *Davies* v. *Huguenin* (1), which is referred to in the judgment of Vice-Chancellor *Kindersley*, I confess that as stated by him I have some difficulty in saying that I could entirely agree with what was held in *Davies* v. *Huguenin;* but it seems to me that even if *Davies* v. *Huguenin* were held to be wrong that would have no effect upon the decision in this case.

With regard to the second point in this case, taken at a late moment, I think there can be no doubt the suggestion, if true, would shew that the covenant was a fraudulent agreement between both parties to it, and fraud is never presumed by the Court; those who suggest it have to prove it.

COTTON, L.J.:—

I am of opinion that the decision of the Master of the Rolls is correct; and from the judgment of the Master of the Rolls which has been read to us, I think that our decision is also in accordance with the views of the Master of the Rolls; but whether that is so or not, I think that, both on authority and principle, the judgment that was given was right. It was said that this was a fiduciary power, and that therefore the donee of the power was in the position of a trustee, and must be so down to the time of his death, absolutely unfettered. Now I asked Mr. *Davey*, during the course of his argument, how he could develop and define a fiduciary power, and I leave out entirely that kind of fiduciary power, if it is so called, where from the form of the power given there is an implied gift in default of an express gift. But a fiduciary power in this case one must consider as a power which is sometimes said to be given to the person as a trustee. Now I think a great deal of inaccurate argument arises from expressions undeveloped and not explained which may bear two senses. How can you say that a man is properly a trustee of a power? As I understand it, it means this, in the words of Lord *St. Leonards*, that it must be fairly and honestly executed. A donee

(1) 1 H. & M. 730.

of such a power cannot carry into execution any indirect object or acquire any benefit for himself directly or indirectly. That is, it is something given to him from which he is to derive no beneficial interest. In that sense he is a trustee, and he is liable to all the obligations of a trustee in this sense, that he must not attempt to gain any indirect object by the execution of the power in a way which in form is good, but which is a mere mask for something that is bad. Now it is not here suggested, or barely suggested, that the appointment was a mask to do something which could not be done. It was an absolute gift to his son in effect, with a covenant or bond that he would not revoke the appointment in favour of the son, but there was no possible suggestion, with one exception, that the intention was in any way to benefit himself. It was done for his son; taking the whole transaction, it was what he thought would be best for the interests of the son, and it is clearly the duty of a father, who has such a power, to do what on the whole he considers to be the best for the family amongst whom the property is under the power to be distributed.

There are two matters, no doubt, which I must deal with. It was said that the execution of the power by the will was to relieve the father from the obligation which he contracted under the bond. I do not go so far as to give an opinion that the bond is absolutely bad. The question may hereafter arise, but I give no opinion upon that point at present. In one sense it is clearly bad, namely, that it cannot be construed as an exercise of a power of appointment, nor is it one that a Court of Equity would specifically perform: but I do not give any opinion that it is one under which no relief could be sought by way of damages from the father's estate. But in reality the will was not executed in order to relieve the father from the obligation. The obligation began after the will was executed, and the whole was one transaction, and if anything, it was a contract not to revoke the will which he had made. But it is not every possible benefit to the donee of a power from the exercise of it which will make the execution of the power bad. Mr. *Davey* went so far as to say—I think his argument necessitated it—that a moral obligation on the part of a donee of a power would be sufficient to vitiate the exercise of a power, and I put to him such a point as this, than which I can

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conceive no stronger moral obligation. A man has no property of his own, but has a daughter who is going to marry. He says: "I cannot make you any present allowance, or give you any present fortune, but I will see that you are provided for by my will." He has nothing but a power of appointment by will. Can it be said, without straining to an excess, which makes it almost absurd, the doctrine of this Court, that a will executed under those circumstances in favour of that daughter or her husband would not be a good execution of a power? To say so would be to defeat the very object of the power. No doubt it is in the power of the father at the time of his death to make or not to make the will, and to distribute in such proportions as he thinks fit, but there is a moral obligation of the strongest kind to make a provision for the daughter in consequence of the circumstances under which the marriage takes place. Then suppose this further case. Suppose a father is surety for his son; if the son has got no money, the father will be called upon to pay: but can it be said that an appointment to the son under those circumstances is bad? The result indirectly will be that, instead of the father's own estate paying that debt, the son will pay out of money which he gets from the appointment, and, as has been said already by Lord Justice *James*, and as was said by Lord *Hatherley*, one really must not strain too far the doctrine of this Court in order to avoid execution of powers which are done honestly and for the benefit of the objects of the power according to the best judgment of the donee, without any indirect motive to secure a benefit to himself. Of course if there is anything of that sort—anything corrupt—no appointment can possibly stand. So, if there is any attempt to do what cannot be done by means of the power, that is bad. In the present case, by the mere exercise of the power no indefeasible interest could have been given to the son at the time, and it may be said that this therefore is attempting to do indirectly what cannot be done directly. But there is the absolute appointment to the son as far as it can be made absolute, leaving him to deal with it as he thinks fit for his benefit, and it is not that the father deals with it by way of raising money or deals with it under any contract or engagement that he makes, but as far as he can, leaving it by will to the son, he puts the son in the position of

doing what the son thinks most for his interest and what the father does not think for his disadvantage. It is to the appointee, and to him only, that the father looks, so as to enable him, as far as he can, having regard to the nature of the power, to do what is most for his benefit.

I have dealt with the case without reference to the authorities, but when we look at the authorities, it is clear that it is settled that such a covenant as this does not vitiate an appointment made in accordance with it. We have the decision of *Coffin* v. *Cooper* (1), before the Vice-Chancellor *Kindersley*, carefully considered, where, throwing aside what would be pushing the doctrine to an extreme, he gave effect to the appointment, and held it not to be bad. We have also the same point decided in the Court of Appeal in the case of *Bulteel* v. *Plummer* (2).

I must add one word more to explain why I hesitate to say that such a bond as this is entirely void. It has been held that under certain circumstances such a bond, or one very like it, can be held to be a release of the power. If it is bad, it must be bad *in toto*, and I am not satisfied that it can be good as a release of a power and yet bad altogether as a covenant. But at the present time I give no opinion whether this covenant is in law bad, and whether, under those circumstances, it could be enforced against the assets, if there were any, of the donee.

Solicitors: *Last & Sons; Burne & Hunt.*

(1) 2 Dr. & Sm. 365. (2) Law Rep. 6 Ch. 160.

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LEGGOTT *v.* BARRETT.

[1880 L. 0359.]

Trade—Sale of Goodwill—Injunction—"Dealing with" Customers of old Firm.

Where two partners dissolve partnership on the terms that one shall have the goodwill and continue the business, and the retiring partner sets up a similar business in the neighbourhood, the Court will grant an injunction to restrain the retiring partner from soliciting the old customers of the firm, but will not restrain him from dealing with them.

The decision of *Jessel*, M.R., reversed.

Ginesi v. *Cooper & Company* (1) disapproved.

THE Plaintiff, *H. Leggott*, was for some years in partnership with the Defendant, *Obadiah Barrett*, as ironmongers at *Bradford*, under the firm of *Barrett & Leggott*.

On the 23rd of July, 1879, the Plaintiff and Defendant signed an agreement for dissolution of partnership which provided—

That the stock-in-trade, book debts, and goodwill should be taken by *Leggott*, who would continue the business on his own account:

That *O. Barrett* should retire from the business, and not commence business as an ironmonger either on his own account or in partnership with any other person, or take any situation in *Bradford* or within ten miles thereof for the space of ten years, except in *Leeds:* and in that case he undertook not to do business in *Bradford* directly or indirectly:

That *Leggott* should pay to *Barrett* £2000 for his share of the business:

That a proper deed of dissolution should be prepared and signed.

Leggott paid the sum agreed on, and a formal deed was executed on the 10th of November, 1879. This deed recited at length the agreement of July, 1879, and it was witnessed that the Defendant assigned and transferred to the Plaintiff all his undivided share in the stock-in-trade, horses, carts, and effects of or belonging to the late partnership business, and in the debts due and owing to the same. And by the same deed the Defen-

(1) 14 Ch. D. 596.

dant covenanted with the Plaintiff that he would not within the space of ten years from the date of the dissolution of the partnership commence business either on his own account or in co-partnership with any other person, or take any situation in the trade or business of an ironmonger in *Bradford* or within ten miles thereof, except in *Leeds*, and in that case he would not do business in *Bradford* directly or indirectly.

The Plaintiff thenceforth carried on the old business of *Barrett & Leggott:* but he had recently discovered that the Defendant had, in October, 1879, set up a business as ironmonger at *Leeds* on his own account, in partnership with a person named *Russell*, under the firm of *Barrett & Russell*, and had gone about among the customers of the old firm and solicited their custom. This he had done by circulars addressed to the customers of the old firm, and several of the customers had in fact commenced to deal with the Defendant.

The Plaintiff accordingly brought the present action against *Barrett*, claiming an injunction to restrain him from soliciting the customers of the old firm, or in any way interfering with the goodwill of the business which had been purchased by the Plaintiff.

As soon as the action was commenced the Plaintiff moved for an injunction to the same effect as that claimed in the action.

The notice of motion was subsequently amended by special leave, and, as so amended, asked that the Defendant, his partners and agents, might be restrained by injunction until judgment in the action, or further order, from applying to any customer of the firm of *Barrett & Leggott* privately or by letter, personally or by a traveller, asking such customer to continue to deal with the Defendant, or not to deal with the Plaintiff, or from actually dealing with such customer as customer; or from otherwise prejudicially interfering with the goodwill of the firm of *Barrett & Leggott* purchased by the Plaintiff, and from advertising the new business of the Defendant in *Denton's Railway Time Table*, &c.; or from otherwise infringing the covenant of the Defendant in the deed of dissolution that the Defendant would not do business in *Bradford* directly or indirectly.

The motion came on to be heard before the Master of the Rolls on the 14th of May, 1880.

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Roxburgh, Q.C., and *Maidlow*, for the motion, submitted that, having regard to his Lordship's recent decision in *Ginesi* v. *Cooper & Company* (1), the injunction should extend to restraining the Defendant from "dealing with" the customers of the old firm.

Chitty, Q.C., and *Ingle Joyce*, for the Defendant, submitted that he was at all events entitled to deal with the customers of the old firm, provided he did not actually solicit them for orders; though, after his Lordship's direct decision upon the point in *Ginesi* v. *Cooper & Company*, they could not re-argue the question.

HIS LORDSHIP then granted an injunction in the terms of the amended notice of motion.

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The Defendant appealed from the order. The appeal was heard on the 27th of July.

Chitty, Q.C., and *Ingle Joyce*, for the Appellant:—

We make no objection to the order except as to the restriction against dealing with the customers of the old firm. The Master of the Rolls followed his own decision in *Ginesi* v. *Cooper & Company*: but there is no authority or principle on which that decision can be supported. When two partners dissolve partnership and one takes the goodwill, there is no law to prevent the other from setting up a similar business in his own name, and dealing with whomever he pleases, provided he does not assume or imitate the name of the old firm, and provided there is no stipulation in the contract for dissolution preventing him from doing so: *Labouchere* v. *Dawson* (2); *Churton* v. *Douglas* (3); *Cruttwell* v. *Lye* (4). In the present case the rights of the parties are fixed by the deed, and there is nothing to restrict the dealings of the Defendant with the old customers, provided he does not do business in or near *Bradford*. The Court has no jurisdiction to go beyond the contract between the parties. By such an injunction as this the Court would be restraining the customers as well as the dealer.

(1) 14 Ch. D. 596.
(2) Law Rep. 13 Eq. 322.
(3) Joh. 174.
(4) 17 Ves. 335.

Roxburgh, Q.C., and *Maidlow*, for the Plaintiff:—

If there is no precedent for this order it is a proper case for the Court to make one. It is in the highest degree inequitable to allow the Defendant, having made the bargain which he has made, to deal with the old customers. The agreement on which the deed was based, and which must be read as explaining it, expressly says that the Plaintiff was to have the goodwill and the Defendant was "to retire from the business." How can it be said that he keeps this agreement if he sets up the same business and deals with the old customers? At all events, the Defendant ought to be restrained from dealing with any of the customers whom he has solicited.

JAMES, L.J.:—

The Appellant in this case does not complain of the injunction so far as it restrains him from applying to any customer of the firm of *Barrett & Leggott* privately by letter or by traveller, asking such customer to deal or continue to deal with the Defendant and not to deal with the Plaintiff, but he does complain of the words "or from actually dealing with such customer as customer," which, of course, means actually dealing with any customer or customers of the firm of *Barrett & Leggott*. Now, for those words there is no authority whatever, except the authority which is reported of the same Judge in a similar matter, who for the first time thought himself called upon to enlarge the injunction which had thitherto been granted, so as to prevent what he thought would be a wrong. I do not like going much into the case, because what I should say might perhaps be considered to mean that the injunction which is submitted to is too wide; but I cannot help saying that I think it is very important, according to my view of the law of contracts, both at Common Law and in Equity, that if parties have made an executory contract which is to be carried out by a deed afterwards executed, the real completed contract between the parties is to be found in the deed, and that you have no right whatever to look at the contract, although it is recited in the deed, except for the purpose of construing the deed itself. You have no right to look at the contract either for the purpose of enlarging or diminishing or modifying the contract which is to be found in the deed itself. A recital of the agree-

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ment in such deed would have the same effect as an ordinary preamble to an Act of Parliament, or any other instrument, as shewing what the object of the parties was, and what they were about to do, so as to afford a guide in the construction of their words; but you have no right for any other purpose to look at anything but the deed itself, unless there be a suit for rescinding the deed on the ground of fraud, or for altering it on the ground of mistake.

Looking at the deed, I can find no covenant from which I can imply an agreement not to deal with any person or persons who had been a customer or customers of the firm of *Barrett & Leggott*. I assume that there is to be found in it by implication the prohibition to which the injunction applies—that is to say, from applying to any customer by letter or by traveller, asking such customer to deal or continue to deal with the Defendant. At first it did appear to me that we might, from the equitable view of the case, say that the Defendant shall be prevented from dealing with any customer or customers whom he had solicited; but it appeared to me that that was too vague and too wide. It does not seem to me that we can, upon any just principle, prevent his supplying a man with goods if he applies for them. A man might give an order afterwards without any reference to the previous solicitation; he might have forgotten it, and seen the shop as he was passing by it afterwards. In order to prove damages at law the person would have to shew that the customer had come there by reason of the solicitation, and would have gone to the other trader but for the solicitation; that he had been seduced from the one to the other. I do not think we are warranted on any authority in holding that. Certainly I am unable to see any principle upon which we could extend the injunction beyond the very wide terms to which the Defendant submits to actual dealing with the customers of the firm. The Master of the Rolls seemed to assume that a man in dealing with a customer was really doing something which was absolutely dishonest, and was plainly stealing that which he had sold. I need hardly say that I am unable to come to that conclusion. Even if we look at the previous agreement, it is very plain what was agreed to. I cannot find that the words "*Obadiah Barrett* will retire from the business" (those are the

strongest words and the only words from which any such contention could be derived) mean that he will never, directly or indirectly, under any circumstances, have any dealings with any customer who chooses to come to him, and who happens to have been a customer of the former firm. It means that you are not to solicit customers. If the man was to open a shop in a place where he was authorized to do it, and not within ten miles of *Bradford*, I cannot compel myself to see any implied obligation upon him, either legal or moral, to shut his door against a customer who comes to him of his own free will.

BRETT, L.J.:—

I entirely agree with my Lord that where there is a preliminary contract in words which is afterwards reduced into writing, or where there is a preliminary contract in writing which is afterwards reduced into a deed, the rights of the parties are governed in the first case entirely by the writing, and in the second case entirely by the deed; and if there be any difference between the words and the written document in the first case, or between the written agreement and the deed in the other case, the rights of the parties are entirely governed by the superior document and by the governing part of that document. If there is any doubt about the construction of the governing words of that document, the recital may be looked at in order to determine what is the true construction; but if there is no doubt about the construction, the rights of the parties are governed entirely by the operative part of the writing or the deed. If, therefore, there had been any difference here between what was called the preliminary contract and the deed, I should have thought that it must have been the deed which governed, but I confess I can myself see no difference at all.

In this case the subject-matter of the agreement was a dissolution of partnership. It was not the case of the sale of a goodwill by a person who had been in possession of the business to another who had nothing to do with the business. It was a dissolution of a partnership, and the first part of the agreement contains these words, "The goodwill of business to be taken by *Henry Leggott*," that is, by the partner left in the business.

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The mere fact of the other going out of the partnership, if nothing else was stated, left the goodwill in *Henry Leggott*, the other partner, and I presume that is the reason why nothing is said about goodwill in the deed. It being a deed dissolving a partnership, it follows that the goodwill is left to the partner who retains the business. If it had been a sale of a goodwill to a stranger, I should be myself very apt to agree entirely with the doctrine of *Labouchere* v. *Dawson* (1), and I think that there would be an implied contract on the part of a person who sells a goodwill that he will not immediately after solicit the customers, who are really the people who form the goodwill; and I should say the same where there is a dissolution of partnership for valuable consideration, that the outgoing partner who dissolves the partnership for good consideration does impliedly contract that he will not immediately afterwards do away with that for which he has been paid by soliciting the customers, and so practically destroying the goodwill which he has agreed to leave with the surviving partner. In either case I should be inclined to think that the doctrine of *Labouchere* v. *Dawson* was right, and that the doctrine really consists of this, that there is such an implied contract in either case. But that implied contract only goes to the extent of *Labouchere* v. *Dawson*, and goes no further. It is therefore an implied contract that he will not solicit the former customers. If that be so, upon the mere fact of the agreement to dissolve the partnership for a consideration, that implied contract arose at once; the goodwill remained thereupon with the remaining partner, and there was an implied contract that the other would not disturb it; but neither upon the sale of the goodwill, nor upon such a dissolution of partnership as there is here, is there any contract arising from those facts alone that he will not set up business himself—I do not mean the same business or with the same firm's name, that cannot be—but a similar business. If there had been no further covenant in this case, *Barrett* might have set up the business which he has opened at *Leeds*, at *Bradford* or anywhere within the ten miles. It required a new and independent covenant to prevent that, and that he should agree that he would not exercise

(1) Law Rep. 13 Eq. 322.

that right which was left in him. That covenant he has made. That new and independent covenant seems to me to be that he will for ten years, and within ten miles of *Bradford*, retire from the business of an ironmonger to this extent, that he will not commence business on his own account, that he will not commence such a business in partnership with anybody else, and that he will not take a situation in an ironmonger's business within those ten miles, except in *Leeds*. Therefore, out of that new and independent covenant *Leeds* is excepted, and in *Leeds* he may do exactly what he might have done if that new and independent covenant had not existed. He may do in *Leeds* precisely what he might have done, but for that covenant, in *Bradford*, or anywhere within ten miles. It was said that he might have set up business next door, subject only to this, that he was not to solicit customers, but not subject to this, that if customers chose to come and deal with him without being solicited, he might not deal with them. The truth is, that to enjoin a man, or to prevent him by means of damages when he does it, against dealing with people whom he has not solicited, is not only to enjoin him, but to enjoin them, for it prevents them from having the liberty which anybody in the country might have of dealing with whom they like. If they are induced by his solicitations, that is a different thing; but it seems to me that it would be quite wrong to imply any contract that he will not deal with people who come of their own accord to deal, even though they were former customers. There has been no authority cited for such extension of the rule, except the view of the Master of the Rolls in that former case. Of course one hesitates when one finds that the Master of the Rolls had such a strong view, but we are bound to act upon our own convictions, and having heard all that can be said in support of the view of the Master of the Rolls, I confess I cannot agree with it, and therefore I think that these additional words, which are objected to, ought not to be put into this injunction.

COTTON, L.J.:—

We have only to consider part of this injunction. In dealing with this case, both as regards the deed and as regards the words of the contract, there is a principle which, I think, applies, which

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is this, that where parties have made a bargain and have contracted as to what rights one party shall gain over the other by the bargain, we ought not to put a forced interpretation on particular words used in the bargain in order to remedy what we may think, in the particular case, is a hardship on one of the parties. I apply that in two ways. First of all, we have here a deed deliberately entered into after agreement, and the parties have done what they thought necessary, besides what had been already done, in order to give effect to the terms of the contract previously entered into by them. It recites that a sum of money had been paid, that the partnership had been dissolved, and that for more effectually carrying the agreement into effect certain things ought to be done. Those things are, an assignment of the share of the Defendant in the partnership effects in terms which, I think, would be equivalent to an assignment and sale of the goodwill. Then there is a covenant corresponding to the fifth clause of the preliminary agreement, which says nothing about retiring from the business, but does contain a stipulation that *Barrett* shall not, except in *Leeds*, carry on the business of an ironmonger within ten miles of *Bradford* for a period of ten years. If there is any difference between the agreement and the deed, the deed is that which the parties have thought it right to adopt as effectually protecting the rights of the purchaser under the previous contract of purchase and sale, and if there were any difference, as the Lord Justice has said, the deed must decide the rights of the parties. But there is not the slightest difference. When one looks at the agreement it is simply that the Defendant shall retire from and the Plaintiff shall continue in and carry on the partnership business, that is to say, the business theretofore carried on by the partnership—that he shall have the goodwill and effects of the partnership. That is what is carried into effect by the deed. But it is said that the fifth clause shews that retiring from the business must have a special and peculiar effect here, because of the covenant not to carry on the business within ten miles. Retiring from the business, read with the other clause, in my opinion means simply that the Plaintiff shall continue the old partnership business with the goodwill and effects. That covenant is added to give the Plaintiff something which he would not otherwise have had, because the sale of the

goodwill, according to the decision of the Master of the Rolls, would not have prevented the person who sold the goodwill from carrying on business in *Bradford*, where the previous partnership business was carried on. It is a question whether or not there is anything in the sale of a goodwill which can prevent the seller from dealing with the customers of the old firm. Assuming that the contract and the deed are in the same terms, is there anything which will justify the Court in construing a sale of goodwill as an implied contract not to deal with any customers of the old business, the goodwill of which was sold? In my opinion not. Here the parties were dealing with that upon which the law had put a definite and fixed interpretation. It was well known what a sale of goodwill implied, and subject to the question whether it does justify the previous part of the injunction in this case, which I am not in any way dealing with, although many cases have dealt with the effect of the sale of a goodwill, no case has ever laid down that a man who had sold his goodwill, although he set up a shop next door, was not justified in dealing with the customers of the old firm whom he did not solicit to come there. Goodwill, possibly, in some of the later cases, has been a little extended, but undoubtedly the cases have established that the sale of goodwill does prevent a man from representing that he is carrying on the old business or that he is the successor of it, and in that way trying to get the customers of the partnership. But in *Churton* v. *Douglas* (1) the judgment of the Vice-Chancellor quite concurs, I think, with the previous decisions, in assuming that the Defendant might, if he thought fit, have carried on business with the customers of the old firm, provided that he did not represent to them that his was the old business, or that he was the successor in business of the old firm. Therefore, to say that the Defendant should not be at liberty to deal with any customer whom he did not solicit to deal with him, is to give a forced interpretation to the words used. In my opinion that is not the fair meaning of a sale of goodwill.

What I had a doubt about is whether the injunction ought not to be modified in such a way that he would be prohibited from getting the benefit of past acts which he is at present prohibited from repeating. Of course the injunction could only go to restrain

(1) Joh. 174.

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him from dealing with customers who had been induced by his solicitation to come to him. Assuming the injunction to be right, it would be wrong of him to go to the customers of the old firm and solicit them to come to him. Suppose a customer said, "No, I will stick to the old firm," but afterwards the person so solicited had reason to be dissatisfied, and being so dissatisfied it would be exceedingly inconvenient to him if he found that although he wished to go to the person who had sold the goodwill, he could not consistently with his engagements do so. Are we, in such a case, to prevent the person from dealing because he had been once solicited? In my opinion that would not be right, and the proper mode of dealing with his previous wrongful act, assuming it to be wrongful, that is to say, against the law, would be to give the Plaintiff damages in respect of the loss which he might have sustained, and not cause the excessive inconvenience of giving an inquiry whether the parties were induced to deal with him in consequence of his solicitations. I think we ought entirely to dissolve that part of the injunction of which the appeal complains, and not to modify it or give any qualified injunction with reference to customers of the firm who have been solicited.

Solicitors for Plaintiff: *Wynne, Baxter, & Rance,* agents for *Beverley, Bradford.*

Solicitors for Defendant: *R. Smith & Wilmer.*

C. A. 1880 *July* 31.

In re DICCONSON (A LUNATIC).

Lunatic—Sale of Lunatic's Property, reserving the Minerals—Lunacy Regulation Act, 1853 (16 & 17 *Vict. c.* 70), *s.* 124.

The Court has power under the *Lunacy Regulation Act,* 1853, s. 124, to make an exchange of the land of the lunatic without the minerals under it.

THIS was a petition of the committee and next of kin of the above-named lunatic, praying the Court to authorize the committee to carry into effect, among other things, a proposal for the exchange of certain freehold lands of the lunatic near *Wigan* for other lands belonging to the infirmary at *Wigan.* It was pro-

posed that the land of both parties should be conveyed without the mines and minerals under the same, and without any obligation to leave vertical or other support for the surface.

Wright, for the Petitioners, said that the conveyance of the minerals would cause great inconvenience to both parties; and that the proposed exchange was quite in accordance with the custom of the country.

COTTON, L.J :—

The question is whether the Court has power under the 124th section of the *Lunacy Regulation Act* to authorize an exchange of land of the lunatic without the minerals; but I think the words of the section are sufficient for that purpose, and that it is right to make the order.

JAMES and BRETT, L.JJ., concurred.

Solicitors: *Meynell & Pemberton.*

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[1879 F. 81.]

Chambers—Vesting Order—Right to transfer Stock—Trustee Act, 1850 (13 & 14 *Vict. c.* 60), *s.* 43—15 & 16 *Vict. c.* 80, *s.* 26—18 & 19 *Vict. c.* 134, *s.* 16—*Cons. Ord. XXXV., r.* 1.

In an action commenced by writ for the administration of a testator's estate, an order for accounts was made in Chambers under Order XV. Subsequently an order was made in Chambers directing the Plaintiff and Defendant to transfer a sum of stock into Court. The Defendant could not be found, and an order was made in Chambers vesting the right to transfer the stock in the Plaintiff, and directing him to transfer it into Court. The bank objecting to act on this order on the ground of its having been made in Chambers, a motion was made by arrangement for an order directing the bank to act upon it :—

Held, by *Jessel*, M.R., that the Judge had jurisdiction to make the order on summons in Chambers, and that the bank ought to be ordered to act upon it.

Held, by the Court of Appeal, that, having regard to the 18 & 19 Vict.

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c. 134, s. 16, Cons. Ord. XXXV., r. 1, and the course of practice, there was so much doubt as to the jurisdiction as to render it unsafe to make such a vesting order in Chambers, and that the order directing the bank to act upon it ought to be discharged.

20 L.D. 337. 22 L.D. 635 636-7-8-9

THIS was an action for administration of the estate of *W. C. Frodsham* commenced by writ. An order for accounts was made on the 5th of August, 1879, in Chambers, under Order XV. On the 12th of November, 1879, an order was made in Chambers that the Plaintiff and the Defendant should transfer into Court to the credit of the action the sum of £5718 9*s.* 8*d.* consols standing in their names, and that one moiety of the dividends thereon should be paid to each of them the Plaintiff and Defendant.

On the 2nd of February, 1880, an order was made in Chambers, whereby, after stating that it appeared to the satisfaction of the Judge that under the testator's will the Plaintiff was jointly entitled with the Defendant to the £5718 9*s.* 8*d.* stock standing in their names upon the trusts of the will, and that the Plaintiff was beneficially interested in the stock, and that the Defendant could not be found, it was ordered that the right to transfer the said stock should vest in the Plaintiff, but only for the purpose of making the transfer into Court thereinafter directed. And it was ordered that, notwithstanding the order of the 12th of November, 1879, the Plaintiff alone should, on or before the 15th of April, 1880, transfer the stock to the credit of the cause, and that one moiety of the dividends on the stock when so transferred should be paid to the Plaintiff during her life, or until further order. And that out of the other moiety of the dividends during the life of the Defendant, the costs of the application should be paid, and the residue paid to the Defendant.

The *Bank of England* being dissatisfied with this order by reason of its having been made in Chambers, it was arranged that for the purpose of having its regularity formally decided by the Court, the Plaintiff should move for an order directing the bank to act in accordance with it.

The motion was heard before the Master of the Rolls on the 14th of May, 1880.

Hadley, for the motion.

Kekewich, Q.C., for the *Bank of England*.

JESSEL, M.R.:—

The matter stands in this way. At the time of the passing of the *Trustee Act*, 1850, there was no such thing as an application by summons in Chambers; because the jurisdiction in Chambers did not begin till 1852. The 43rd section of that Act is as follows:—"And be it enacted, that whensoever, in any cause or matter, either by the evidence adduced therein or by the admissions of the parties, or by a report of one of the Masters of the Court of Chancery, the facts necessary for an order under this Act shall appear to such Court to be sufficiently proved, it shall be lawful for the said Court, either upon the hearing of the said cause" (which at that time could only be heard in Court) "or of any petition or motion in the said cause or matter, to make such order under this Act."

At that time an order could not be made at all by a Judge of the Court of Chancery, except in one of the three ways mentioned in the section. This is not, therefore, the case of an Act of Parliament mentioning some modes of procedure out of many. The section mentions every then existing mode of procedure in the Court of Chancery, for the only way in which a Judge could act was—on the hearing of a cause, or on motion or petition. The Act, therefore, did not mean to say that a Judge should not make the order except by certain particular modes selected out of the different modes of procedure by which an order could be obtained, but it meant to say that he should do it by any mode of procedure known to the Court. It was, if I may say so, an enlarging section, and not a restricting section.

Afterwards it was enacted by the *Trustee Extension Act* (15 & 16 Vict. c. 55), ss. 6 and 7, that whenever an order as to stock was made under the Act, the right should vest, and that the *Bank of England* should be indemnified in acting under this order, which enactment, no doubt, was made, not for the purpose of allowing irregular orders to be made, but for the purpose of preventing expense to parties, if any order were made, by accident, irregularly.

After this, in 1852, a very remarkable change took place in the

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procedure of the Court of Chancery. The Masters were abolished, so that the facts necessary as the ground of an order could no longer appear by a Master's report; and, besides that, the Master of the Rolls and the then Vice-Chancellors were allowed to dispose of business sitting in Chambers, which was an entirely new jurisdiction. By the 26th section of the *Master in Chancery Abolition Act*, 1852 (15 & 16 Vict. c. 80), they were authorized to take in Chambers not only such matters as therein specified, but such other matters as each Judge might from time to time deem fit, or as from time to time might be directed by any general order of the Lord Chancellor. So that, subject to any general orders, it was for the Judge himself to decide what other matters he should hear in Chambers. The *Chancery Procedure Act* of 1852, which passed at the same time and was part of the same scheme, introduced by sect. 45 a new mode of instituting administration suits, by what is now called an originating summons; and where the suit was instituted by summons, the first hearing and the hearing on further consideration all took place in Chambers, and on summons. If then we turn back to the 43rd section of the *Trustee Act* of 1850, this result follows—that as the hearing of a cause so commenced might be on summons, an order vesting the right to transfer stock could be made in Chambers at the hearing of it. Now it would be strange if, although an order vesting the right to call for a transfer of the stock could be made on summons at the hearing in Chambers, such an order could not be made on summons at any other stage of that cause. It would be a very remarkable interpretation of this Act of 1850 standing alone; because it is obvious that it meant not to diminish the power of the Court, but, as I said before, to enlarge it. Therefore, when we have a new mode of procedure by summons and a power in the Judge to decide what business shall be so disposed of, it seems to me quite clear that if the Acts to which I have referred stood alone, the order might be made not only at the hearing of the cause, if the cause was heard on summons, but at any other stage of the cause if the Judge thought fit.

I must say that I should have no doubt about the matter were it not for the Act 18 & 19 Vict. c. 134, s. 16, "And whereas, by divers Acts of Parliament the Court of Chancery is empowered to

make orders in respect of the disposition of trust funds and other matters under its jurisdiction, upon petition presented or motion made in a summary way without bill, but such orders cannot be made in respect of the same matters upon application at Chambers." Now, that recital is erroneous. There is no doubt that there were some cases in which the Judge could make such orders upon application in Chambers, but what the draftsman must have meant was that the words "without bill" should govern the whole clause, and by those words he must have meant to say "not in a cause." He has forgotten that you can have an originating summons. He is referring to applications not made in a cause—to matters commenced by motion or petition, and then he states his opinion (forgetting the 26th section of the *Masters Abolition Act*, to which I have already referred) that those applications must be made by motion or petition, and cannot be made on application at Chambers. The section then proceeds: "Be it therefore enacted, that the business to be disposed of by the Master of the Rolls and the Vice-Chancellors respectively, while sitting at Chambers, shall comprise such of the matters in respect of which the Court of Chancery is so as aforesaid empowered to make orders in a summary way, as the Lord Chancellor, with the advice and assistance of the Master of the Rolls and the Vice-Chancellors, or of any two of them, may by any general order direct."

Now, I agree that there is some difficulty in saying that this does not repeal the power of the Judge; but it was obviously intended to extend his power. The draftsman who drew it did not know the practice and did not know the statutes which gave the Judges the power already, and, supposing that they had not the power, he frames an enactment which purports to give them a less power than what they already had. Surely that cannot be a repeal of the power. It appears to me that when the thing is fully considered, the draftsman by the words "without bill" meant to exclude applications made in a cause, evidently considering that causes still began by bill, which they did not in all cases do. I think that the draftsman had in view not the *Trustee Act* so much as the *Lands Clauses Act*, and the other Acts, of which there are a great number, under which what I call the matter originates by petition or motion. In the present case we have a cause which before

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the Judicature Acts would have been commenced by an originating summons. It never could have been meant by this enactment to interfere with any order which the Judge could otherwise have made at the hearing of the cause, but it must have been meant to extend the power to make the application in some other way. In my opinion, it does not repeal the power, and I think that in all cases in which an order can be made at the hearing of the cause, it can be made at the hearing of the cause in Chambers if the cause is originated by summons only, or is wholly disposed of in Chambers. That is quite clear; and I think it is equally clear that the true construction of this Act of Parliament is, that it does not take away powers which already existed, but was intended to extend the power to cases not already provided for by giving a further power to the Lord Chancellor and the Master of the Rolls and the Vice-Chancellors, or any two of them, to direct such application to be made in Chambers.

If that is the true view of the section, the result will be this, that whenever a cause is wholly disposed of in Chambers, there the application may be made as a matter of course by summons, and, in every other case, there must be a special direction by the Judge that that particular business shall be done on summons.

Therefore it appears to me that the order in this case was properly made in Chambers, and that the *Bank of England* ought to act upon it.

The following order was made:—

This Court being of opinion that the Judge had jurisdiction on an application by summons at Chambers to make the said order dated 2nd February, 1880, doth order that the Governor and Company of the *Bank of England* do act in accordance therewith. And it is ordered that the costs of the Plaintiff of and relating to this application be costs in this action.

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The *Bank of England* appealed from this order. The appeal was heard on the 2nd of August.

Kekewich, Q.C., for the Appellants:—

The question turns first upon the *Trustee Act*, 1850, sect. 43, which authorizes the making these orders at the hearing of the cause or on petition or motion. An application by summons does

not come within these terms. Then the *Masters Abolition Act*, 15 & 16 Vict. c. 80, s. 26, provides that the business to be transacted in Chambers shall consist of such of the matters therein mentioned as the Judge shall from time to time think may be more conveniently disposed of in Chambers than in open Court, "and such other matters as each Judge may from time to time see fit, or as may from time to time be directed by any general order of the Lord Chancellor." There is no general order which includes vesting orders, and it is impossible to bring this case within the enactment unless it is construed as meaning that the Judge may *pro re natâ* treat any application as proper to be heard in Chambers. I submit that this is not the true construction, and that the intention of the Act was that there should be general rules to guide the parties. The Master of the Rolls laid great stress on the 15 & 16 Vict. c. 86, s. 45, which enabled an administration suit to be commenced by summons, so that the whole proceedings might take place in Chambers, without its ever coming into Court. But this was not an action so commenced. The 18 & 19 Vict. c. 134, s. 16, contains a recital which is in effect a legislative declaration that orders under the Acts enabling the Court to make them on summary proceeding without bill cannot be made on summons in Chambers, and enacts that the business to be disposed of in Chambers shall comprise such of those matters as shall be directed by general order. The only general order made is Cons. Ord. XXXV., r. 1, which authorizes vesting orders to be made in Chambers only where the Court has made an order for sale or conveyance of lands. Up to the present time, no order in Chambers vesting the right to transfer stock has been acted upon, such orders have been made, but an objection has been taken by the bank, and an order in Court obtained. The question raised here by the bank is not as to the propriety of the order, but as to the jurisdiction to make it in Chambers.

[JAMES, L.J.:—Suppose a suit for administration of real and personal estate instituted by summons and the real estate sold under it. Could not a vesting order be obtained in Chambers?]

Yes, it would come under the precise terms of Cons. Ord. XXXV., r. 1, sub-s. 4. The question is of general importance, as these orders are very numerous, and it is of consequence to have a

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settled practice. The present case is a simple one, and the bank are quite willing to act on the order of the 2nd of February, but they submit that it would be dangerous to the public to let a practice grow up of making these orders in Chambers.

Hadley, contrà :—

The 22nd section of the *Trustee Act*, 1850, gives clear jurisdiction to make the order, and the mode of procedure does not affect the jurisdiction.

[COTTON, L.J.:—When a statutory jurisdiction is given, and the statute describes the mode in which it is to be exercised, is it well exercised unless that mode is followed ?]

There is nothing on the face of the order to shew that it was made on summons; it appears to have been made in Chambers, but a Judge can make any kind of order in any place.

[COTTON, L.J.:—As to the expediency of making such orders in Chambers, it is material that Chambers are not a public Court.]

Under 15 & 16 Vict. c. 55, ss. 6, 7, the bank is bound to act under the order, and is fully indemnified in doing so. Then as to the *Trustee Act*, 1850, s. 43, that is an enabling section, and points at every mode of obtaining an order which was then known, its object was to say that the order might be obtained on interlocutory application, which now includes a summons. The 26th section of the *Masters Abolition Act*, 15 & 16 Vict. c. 80, gives the individual Judge the most ample discretion as to what he will dispose of in Chambers.

Kekewich, in reply:—

The indemnity clause in the Act of 1852 is wide, but the Court has always encouraged the bank in objecting, for the good of the public, to any irregularity in vesting orders, as none of the other companies will do it. The declaration of the Legislature in 18 & 19 Vict. c. 134, s. 16, ought to be followed.

JAMES, L.J.:—

Without saying what the strict construction of the Act of

Parliament is, it appears to me that, taking all the Acts of Parliament together, and considering the recital in sect. 16 of the Act of 1855, and the effect of the general order of the 12th of November, 1856, that was made under that Act (Cons. Ord. XXXV., rule 1), and the course of practice which has prevailed ever since, it is at all events doubtful whether the jurisdiction given by the *Trustee Act*, 1850, was intended by the Legislature to be exercised in Chambers, except in cases provided for by general order. Having regard to this doubt, I think we ought to say that such applications ought to be made by petition or motion in open Court, unless and until some general order is made (which no doubt will be made if it is considered desirable) prescribing the conditions under which and the safeguards with which such orders shall be made, if they are made in Chambers at all.

BRETT, L.J. :—

I entirely agree with what my Lord has said. I should be unwilling at present to go further.

COTTON, L.J. :—

I concur in the decision which has been pronounced, but I do not entertain as much doubt as has been intimated by the Lord Justice *James*. It is highly important that the special jurisdiction conferred by the *Trustee Act* should be exercised very cautiously, and that nothing should be done as to which there is a doubt whether it is or is not within the powers given by the Act of Parliament. The Master of the Rolls considered himself to be acting under sect. 43. But the case is not within the words of sect. 43, for the order was made neither upon the hearing of the cause or of any petition or motion. We then find that the subsequent Act, 18 & 19 Vict. c. 134, s. 16, proceeds on the footing that such orders as this cannot be made in Chambers, and a general order made in November, 1856, provides that applications under the Trustee Acts may be made in Chambers where a decree or order has been made directing the conveyance or transfer of real estate, but it goes no further. In my opinion that ought not to be extended by allowing orders to be made in Chambers vesting the right to transfer stock in the public funds which can so much

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more easily be dealt with improperly than land. In the present case a previous order had been made directing a transfer, so that if the property had been land the case would have come within Cons. Ord. XXXV., rule 1; but, following the principle laid down by the Master of the Rolls, it would seem that a vesting order of stock under the Trustee Acts of 1850 and 1852, might be made in Chambers without any such previous order where there was a cause, though, so far as I collect from his judgment, he did not consider that any vesting order could be made in Chambers otherwise than in a cause. I think that the vesting order ought not to have been made in Chambers, and that the order under appeal cannot be sustained.

An order was made discharging so much of the order under appeal as expressed an opinion that there was jurisdiction to make the order of the 2nd of February, 1880, in Chambers, and as directed the bank to act in accordance with it.

Solicitors: *Norris, Allens, & Carter; Freshfields & Williams.*

C. A. 1880 Aug. 6.

In re HULL CENTRAL DRAPERY COMPANY.

Company — Winding-up — Costs — Action commenced before Winding-up by Shareholders for the Benefit of the Company—Jurisdiction—Companies Act, 1862, *s.* 38, *sub-ss.* 7, 110.

An action was commenced by two shareholders in a company, on behalf of themselves and all other shareholders, to impeach a contract made with the company on the ground of fraud. Before the trial the company was wound up, and the Plaintiffs did not obtain leave in the winding-up to carry on the action. At the trial the action was dismissed by consent without costs:—

Held, that the Court had no jurisdiction to order the Plaintiffs' costs to be paid out of the assets in the winding-up, although the Judge who heard the action certified that the action was for the benefit of the company, and gave liberty to the Plaintiffs to apply in the liquidation for their costs.

THE question in this case arose in the winding-up of the *Hull Central Drapery Company, Limited*, which was registered under the *Companies Act*, 1862, in June, 1877.

In March, 1878, Messrs. *W. Mason* and *A. W. Carter* commenced an action in the Chancery Division in the Court of Vice-Chancellor *Malins,* in the name of themselves and all other shareholders of the company, against *B. Harris, T. Shepstone,* and *W. Mead,* three of the promoters of the company, and the company, for the purpose of setting aside a certain agreement made immediately before the incorporation of the company, on the ground of fraud. The Defendants demurred to the claim, and the demurrer was allowed by the Vice-Chancellor, but was overruled, on appeal, by the Court of Appeal, on the 3rd of March, 1879. Shortly afterwards the company went into voluntary liquidation, which was continued under supervision by an order made by Vice-Chancellor *Hall.* No leave was given by the Court in the winding-up to continue the action.

On the 3rd of May, 1880, the action came for trial before Vice-Chancellor *Malins,* when, upon the Vice-Chancellor's suggestion, the Plaintiffs consented to have the action dismissed without costs, and it was ordered that the Plaintiffs might be at liberty to apply to the Court in which the liquidation was proceeding for their costs of the action out of the assets of the company. On that occasion the Vice-Chancellor expressed his opinion that the costs of the Plaintiffs were properly provable in the liquidation on the ground that the action was for the benefit of the company, and that it was not affected by sub-sect. 7 of sect. 38 of the *Companies Act,* 1862 (1); and a memorandum was indorsed on the brief of one of the counsel and signed by the Registrar to that effect.

The Plaintiffs then applied to Vice-Chancellor *Hall* in Chambers on the 2nd of July, who made an order that it appearing that the action of *Harris* v. *Mead* was instituted for the benefit of the shareholders of the company the Plaintiffs should be allowed

(1) 25 & 26 Vict. c. 89, s. 38, sub-s. 7: "No sum due to any member of a company in his character of a member by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company payable to such member in a case of competition between himself and any other creditor not being a member of the company, but any such sum may be taken into account for the purposes of the final adjustment of the rights of the contributories amongst themselves."

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their costs of that action out of the assets of the company. From this order the liquidator appealed.

Ingle Joyce, for the Appellant:—

Whether the action would or not have been beneficial for the company is of no consequence. It was commenced by two shareholders on their own responsibility and was continued without leave being obtained from the Court in the winding-up. The Court, therefore, had no jurisdiction to allow the costs out of the estate.

Glasse, Q.C., and *T. L. Wilkinson*, for the Plaintiffs in the action:—

The Vice-Chancellor in whose Court the action was brought, and who knew the whole merits of the case, was of opinion that the action was rightly brought, and the result would have been beneficial to the company if the winding-up had not intervened. It is therefore a case in which the costs of the action ought to be allowed to the Plaintiffs.

JAMES, L.J.:—

It appears to me that the Court has no jurisdiction at all in the winding-up to make this order. The Court is simply administering the assets of the company for the purpose of paying the debts, and distributing the surplus, if any, among the shareholders. It has no discretion to order payment of anything except legal demands on the company. However good the object of the Plaintiffs in bringing the action, however desirous they may have been to recover assets for the company, they had no right to call upon the other shareholders to contribute to the costs on the ground that it was for their benefit. They ought to have obtained leave from the Vice-Chancellor in the winding-up to continue the action on behalf of the company: and if they had succeeded in recovering money from the Defendants, and the company had taken the benefit of the suit, they might have obtained out of the assets payment of the costs, and perhaps of their costs, charges, and expenses properly incurred. But in the present circumstances I

am of opinion that they are asking the Court to do something which it has no power to do.

BRETT, L.J.:—

It appears to me that there was a suit which, if carried forward, was very likely to succeed, which the company ought properly to have brought, and which, if successful, would have been for the benefit of the company. But the question is whether, the suit having been brought by the Plaintiffs and nothing having been recovered, the Court has jurisdiction to say that the company should bear the costs. It seems to me a just and equitable thing to do, and although a Court of Law would certainly not have the power to order them to be paid, I am rather surprised that the Court of Chancery has not assumed that power. However, it appears that it has not done so.

COTTON, L.J.:—

I agree that the Court has no jurisdiction to make the order appealed from. It is not correct to say that the suit was brought for the benefit of the company. No doubt if anything had been recovered the net proceeds would have gone into the company's coffers. But was it for the benefit of the company to bring the suit? It does not follow that it was so, merely because, if successful, the proceeds would have belonged to the company. Before that can be decided, we must take into account the whole state of the circumstances.

But, assuming the suit to be a proper one, had the Court jurisdiction to allow the costs of it out of the assets of the company? In the first place, as to costs incurred after the commencement of the winding-up. The Plaintiffs might have gone into Chambers and obtained leave to continue the action. As they did not do so, it is impossible to say that the subsequent costs are costs in the winding-up. Then, as to the costs incurred before the winding-up; the Court has no power over the assets except under the statute, and the statute says that the assets are to be applied in discharge of the liabilities of the company. The 110th section says that the Court "may make an order as to the payment out of the estate of the company of the costs, charges, and expenses

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incurred in winding up any company in such order of priority as the Court thinks just." That applies to costs incurred by the liquidator in the course of the winding-up. These costs were incurred by shareholders not representing the company. If they had succeeded they would have got their costs from the Defendants; but as they failed they must take the consequence. These costs are not costs in the winding-up, and ought not to be allowed out of the assets to be administered therein.

Solicitors: *W. Bohm; Cunliffe, Beaumont, & Davenport.*

C. A. 1880 *May* 31; *June* 1; *July* 2.

PUGH *v.* GOLDEN VALLEY RAILWAY COMPANY.

[1877 P. 276.]

Railway Company—Statutory Powers—Diversion of Non-navigable River—Necessity for Construction of Railway—Railways Clauses Consolidation Act 1845 (8 *Vict. c.* 20), *s.* 16.

20 CD 328
329, 338

The power conferred on a railway by the 16th section of the *Railways Clauses Consolidation Act* to divert the course of a river or road, "in order the more conveniently to carry the same over or under or by the side of the railway, as they may think proper," is to be taken as cut down and qualified by the proviso that it be an act necessary for making, maintaining, altering, or repairing and using the railway.

Such a power, therefore, only authorizes such a diversion when the road or river presents an actual obstacle to the construction of the line, and not in a case where the diversion is merely for the purpose of saving the company expense.

Reg. v. *Wycombe Railway Company* (1) followed and approved.

THIS was an appeal from a decision of Mr. Justice *Fry* (2).

The following is a short statement of the facts:—

The Defendant company had, under their private Act of Parliament (which incorporated the *Railways Clauses Consolidation Act*, 1845), constructed a line of railway down the *Golden Valley*, through which runs the river *Dore*, a non-navigable and very sinuous stream, its main course being from north to south.

The Plaintiff was tenant for life of a farm which was situate on the west side of the river, and was bounded by it.

(1) Law Rep. 2 Q. B. 310. (2) 12 Ch. D. 274.

The railway, which was constructed upon an embankment, entered the Plaintiff's land from the north, and crossed the river at the point A in the plan shewn in the former report; then, after proceeding for some distance through land belonging to another landowner, recrossed the river at a point B marked on the plan. The river between the points A and B taking a considerable bend to the west. The Defendants, instead of crossing the river at these two points by bridges, stopped up the bed of the river by their embankment, and diverted the river by cutting, on the eastern side of the points A and B, a goit or channel parallel to the line of the railway. The material excavated from the goit was used in constructing their embankment. By this measure the greater part of the water of the river flowed down the goit, a small stream only running through the Plaintiff's land along the old bed, through a 12-inch pipe which the company placed under the embankment at point A and three 9-inch pipes at point B. The Court, both on the original hearing and also on the appeal, was satisfied that the stream was substantially injured, as the river, from being a fast-flowing stream, would become comparatively stagnant. As the Plaintiff, however, only required the water for the purpose of the watering of cattle, the Defendants contended that sufficient water flowed in the old bed for that purpose, and that their proceedings were justified by sect. 16 of the *Railways Clauses Consolidation Act*. It was stated that if the company were not allowed to divert the river, their line must cross and recross it fifty-seven times in the course of ten miles.

The Plaintiff, by his statement of claim, alleged that the diversion was not a necessary, but only a more economical course to adopt in the construction of the railway, and claimed an injunction to restrain the Defendants from continuing to obstruct by their embankment the natural flow of the river, and from diverting it into the channel or goit, and damages.

The Defendants contended that their conduct was authorized by sect. 16 of the *Railways Clauses Consolidation Act*, 1845, and that the diversion was necessary for the construction and maintenance of their railway.

Mr. Justice FRY, feeling himself bound by the decision of the

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Court of Queen's Bench in *Reg.* v. *Wycombe Railway Company* (1), granted the injunction, at the same time intimating that in his opinion the terms of the section seemed to give some justification to the Defendants for their proceedings.

The company appealed.

Davey, Q.C., and *Speed*, for the company.

Robinson, Q.C., and *Maclean*, for the Plaintiff.

The arguments used in the Court below were repeated, and turned mainly on the construction of the 16th section and the interpretation put on it by the case of *Reg.* v. *Wycombe Railway Company*. In addition to the cases cited below, the following cases were referred to. As to the exercise of their powers by companies, *Marquis of Salisbury* v. *Great Northern Railway Company* (2); *Odessa Tramways Company* v. *Mendel* (3); *Lamb* v. *North London Railway Company* (4); *Webb* v. *Manchester and Leeds Railway Company* (5); *Eastern Counties Railway Company* v. *Hawkes* (6). Upon the question of the effect of deposited plans, *North British Railway Company* v. *Tod* (7); and upon the question of mandatory injunction as opposed to damages: *Isenberg* v. *East India House Estate Company* (8); *Duke of Bedford* v. *Dawson* (9); *Durell* v. *Pritchard* (10); *Krehl* v. *Burrell* (11); and upon the question as to what is a reasonable supply of water, the judgment of Baron *Parke* in *Embrey* v. *Owen* (12).

July 2. THESIGER, L.J., now delivered the judgment of the Court (*James*, *Cotton*, and *Thesiger*, L.JJ.) as follows:—

The Appellants in this case are a railway company who, in the course of making a line of railway, had occasion to form an

(1) Law Rep. 2 Q. B. 310.
(2) 5 C. B. (N.S.) 174; 28 L. J. (C.P.) 40.
(3) 8 Ch. D. 235, 247.
(4) Law Rep. 4 Ch. 522.
(5) 4 My. & Cr. 116, 120.
(6) 5 H. L. C. 331.
(7) 12 Cl. & F. 722; 4 Railw. Cas. 449.
(8) 3 D. J. & S. 263.
(9) Law Rep. 20 Eq. 353.
(10) Ibid. 1 Ch. 244.
(11) 11 Ch. D. 146.
(12) 6 Ex. 353, 370.

embankment, and requiring earth for the purpose, and, being at the same time minded to save the expense of constructing bridges over a small and winding river which lay in the course of their line, cut a channel or goit of about three or four hundred yards in length, from the excavation of which they obtained earth for their embankment, and into which, when excavated, they diverted water which would otherwise have flowed in the old bed of the river between the points of commencement and termination of the goit. They inserted, however, in their embankment a 12-inch pipe through which, as it is alleged by them, they supplied to the old bed sufficient water to meet all the wants of the Plaintiff, who is the owner of the bed and proprietor of the land which lies along the banks of the river between the points referred to. In dealing with the case in the Court below, Mr. Justice *Fry* prefaced his judgment by stating that it was not in controversy that some injury had been done to the Plaintiff by the diversion of the stream—that that which had been formerly a pleasant and free flowing stream would probably, by the operations of the Defendants, be turned into a sluggish stream with reeds and rushes and other weeds growing in it, and although before us there has been some slight attempt to put that in controversy which appears to have been admitted in the Court below, we entertain no doubt that the Defendants' operations have caused a substantial diversion or alteration in the course of the river, and that the Plaintiff has thereby sustained an injury of such a character as to entitle her to an injunction unless, either by any conduct on her part she has precluded herself from claiming it, or, from the nature of the works completed by the Defendants before objection, the case is one in which the Court would refuse a mandatory injunction to restore things to their former condition, or, lastly, the Defendants can justify what they have done under their statutory powers.

There is no ground for imputing any laches to the Plaintiff in the matter of her complaint. Upon the evidence it must be taken that she was unaware of the proposed interference with the river until the works which resulted in such interference were completed; and the delay between the time of her becoming aware of the interference and commencement of the action is

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fully accounted for by negotiations for an amicable settlement of the dispute between her and the Defendants which filled up that period.

As regards the works themselves, there is no evidence from which we can collect any valid reason, on the score of expense or otherwise, why the injunction granted by Mr. Justice *Fry* should be discharged; and the matter for consideration and decision really resolves itself into the one important question whether the Defendants were entitled to do what they have done under the powers conferred upon them by the *Railways Clauses Consolidation Act*, 1845, s. 16. Upon this question there is authority by which Mr. Justice *Fry* properly considered himself bound. In the year 1867 the case of *Reg.* v. *Wycombe Railway Company* (1) came before the Court of Queen's Bench, then composed of the Lord Chief Justice and Justices *Blackburn*, *Mellor*, and *Lush*. The subject-matter of dispute in that case was the diversion of a public road, and to such a road there are no doubt sections in the *Railways Clauses Consolidation Act*, 1845, other than sect. 16, applicable, which are not applicable to a river. But the Judges of the Court of Queen's Bench one and all rested their decision solely upon sect. 16, and upon reasons which were equally applicable to a river as to a road. And the case is in principle a distinct authority for the proposition that in such circumstances as those which exist in the present case, the diversion of a river is unjustifiable. Viewed simply as the decision of a Court of first instance, the authority of this case, notwithstanding the respect due to the Judges who decided it, is not binding upon us; but, viewed in its character and practical results, it is one of a class of decisions which acquire a weight and effect beyond that which attaches to the relative position of the Court from which they proceed. It constitutes an authority which, after it has stood for so long a period unchallenged, should not, in the interests of public convenience, and having regard to the protection of private rights, be overruled by this Court except upon very special considerations. For twelve years and upwards the case has continued unshaken by any judicial decision or criticism as an authoritative exposition of the meaning of sect. 16 of the *Railways Clauses Consolidation*

(1) Law Rep. 2 Q. B. 310.

Act, 1845, in respect of the matter here in dispute. During such period hundreds of special Acts of Parliament have been passed sanctioning the construction of lines of railway and the consequent interference with private rights, and incorporating for that purpose the provisions of the general Act. Promoters must have sought their powers, landowners must have regulated their course of action, and parliamentary committees must have given their sanction to the projects submitted to them upon the faith and footing of a limit to the powers sought and conceded being found in the provisions of the general Act as interpreted from time to time by judicial decisions. If so, it is to be presumed that the limit put upon the powers of a railway company in regard to the diversion of roads and rivers by the decision of the Court of Queen's Bench in *Reg.* v. *Wycombe Railway Company* (1), must have exercised a material influence upon the relations of persons owning land proposed to be affected by special railway legislation and the promoters of that legislation. As a matter of practical experience we cannot doubt that landowners would be advised as to these rights and the limits of the promoters' powers, upon the assumption of the correctness of the law laid down after full argument and in clear and distinct terms by a Court so constituted as was the Court of Queen's Bench in the case referred to, and whose decision, although open to appeal, was not appealed from; and we cannot doubt also that parliamentary committees, in considering any question of protection to landowners in relation to rivers and roads, would be invited to proceed, and would proceed, upon the same assumption. While, therefore, in considering the rights of private parties in cases like the present, the Courts are on the one hand bound—as it has been held by the highest authority they are bound—to disregard any representations, whether in the shape of deposited plans or otherwise, made by promoters other than such as are embodied in the Act of Parliament, they ought, on the other hand, to be careful not lightly to disregard representations which may reasonably be said to be embodied in a special Act which incorporates the general Act after a particular interpretation of it has received judicial sanction, and contains no provisions from which can be collected any intention on the

(1) Law Rep. 2 Q. B. 310.

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part of the Legislature or those who sought its interposition to question or impugn the correctness of that interpretation. To put the matter in another shape, the Courts should be careful not to overrule decisions which, not being manifestly erroneous and mischievous, have stood for some time unchallenged, and from their nature and the effect which they may reasonably be supposed to have produced upon the conduct of a large portion of the community, as well as of Parliament itself, in matters affecting rights of property, may fairly be treated as having passed into the category of established and recognised law.

But although we have thought it right to express these views in regard to the authority of the case of *Reg.* v. *Wycombe Railway Company* (1), we do not feel ourselves compelled to rest our decision mainly upon them. The language of sect. 16 of the *Railways Clauses Consolidation Act*, 1845, is not altogether as clear as might be desired, and there may possibly be cases in which the strict carrying out of the construction adopted by the Judges of the Queen's Bench will present some difficulty. But we think, nevertheless, that they arrived at a sound conclusion upon the matter. There is a presumption, derived from the general current of legislation in regard to railway companies, and the care with which the powers intrusted to them have, as a rule, been limited to the strict necessities of their undertakings, against the intention of the Legislature to confer upon them such wide and unrestricted powers in regard to rivers and roads as those for which the Appellants contend. The protection of owners of property from unnecessary invasion of their rights has always been a cardinal point of parliamentary action in relation to private bills, and it is difficult to see how, in cases like the present, any protection would or could be adequately given if the diversion of roads and rivers were to be made to depend upon the uncertain considerations of economy and the mere possibilities of a railway company's will. The right to compensation in the shape of money payment might in such cases be wholly insufficient to meet the injury inflicted by such diversion, and yet parliamentary committees could hardly take upon themselves to override the provisions of the general Act, and would in any event have a difficulty in specially pro-

(1) Law Rep. 2 Q. B. 310.

viding for or against injuries which from the nature of the case must be wholly uncertain in their incidence. But it is said on the part of the Appellants that this presumption, which, we may observe in passing, was strongly relied on by the Lord Chief Justice in the case quoted, is sufficiently met and is overcome by the language of the section in question. Reliance is specially placed on the words, "in order the more conveniently to carry the same over or under or by the side of the railway," and the additional words, "as they may think proper," which close that part of the section, upon which the Appellants found their right to do what they have done. It is argued on their behalf that from this language may and should be collected a power on the part of a railway company to do what is authorized, not merely in the course of executing and for the purpose of more conveniently executing the particular work of carrying a river or stream of water, or a road, street, or way, either over or under or by the side of the railway, according as the physical character and position of the obstruction would naturally require, but independently of and as a substitute for, and, if thought proper, for the purpose of saving the expense of the execution of that particular work at all. To us, however, it appears that the expressions relied on do not in any way warrant this contention, and that the earlier of them leads to an entirely opposite inference to that which we are asked to draw from it. The authority to divert or alter a river or stream of water, or a road, street, or way, in order the more conveniently to carry the same over or under or by the side of the railway, implies that the company, in the first instance, is compelled, for the purpose of constructing its railway, to carry such river or stream of water, road, street, or way in some mode or another over or under or by the side of the railway; and if the language of the clause be construed, as it may reasonably be, and we think ought to be construed, *reddendo singula singulis*, its meaning becomes plain. A railway company in the course of the construction of the line of railway authorized by the special Act will, from time to time, arrive at a point where a river or stream of water, or a road, street, or way obstructs the further progress of the works. The course or level of the obstruction will be such as naturally to require its being carried sometimes over, at other

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times under, and at other times by the side of the railway, and, whichever of these three modes may in the particular instance be the mode of dealing with the obstruction naturally requiring to be adopted, the company may, in order the more conveniently to carry out that mode, alter, or divert the course, or raise or sink the level of the river or stream of water, or of the road, street, or way constituting the particular obstruction; and the exact manner in which, and extent to which, for the purpose mentioned, the company may carry out that alteration or diversion of the course, or raising or sinking of the level of the obstruction, is, by the words "as they may think proper," left to their discretion, which the Courts will not interfere with if *bonâ fide* exercised. On the other hand, it is not open to a company to alter or divert the course, or raise or sink the level, of a river or stream of water, or of a road, street, or way, for the purpose merely of avoiding altogether, and thus saving themselves the expense of the execution of the work, whether it be of carrying it over or under or by the side of the railway, which the character and position of the obstruction naturally require. This view is in substantial accordance with that expressed by Lord *Blackburn*, then Mr. Justice *Blackburn*, in his judgment in the case of *Reg.* v. *Wycombe Railway Company*, and, adopting and applying *mutatis mutandis* his language (1), we are of opinion that if it was the Appellants' intention to divert the river in the manner in which they have diverted it in this case, they ought to have given the proper notices and have obtained the insertion of a clause in their special Act giving them this power. Entertaining this opinion, it becomes unnecessary for us to decide whether, as was contended on the part of the Respondents, the river in question was, as a matter of fact or as a matter of law, beyond the limits within which, under sect. 16 of the general Act, an alteration or diversion could take place, and the appeal must, for the reasons given, be dismissed with costs.

Solicitors for Appellants: *Roberts & Barlow*, agents for *James & Bodenham, Hereford.*

Solicitor for Respondent: *I. H. Wrentmore*, agent for *James & Co., Merthyr Tydvil.*

(1) Law Rep. 2 Q. B. 323.

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C. A.
1880
V.-C. H.
Feb. 4.
C. A.
July 1, 2;
Aug. 3.

[1877 M. 385.]

*Statute of Limitations—Mortgagee in Possession—Bankruptcy of Mortgagor—Acknowledgment of Mortgagor's Title after Bankruptcy—Annulment of Bankruptcy—*3 & 4 *Will.* 4, *c.* 27, *ss.* 28, 34—*Principal and Agent.*

In 1828 the Plaintiff mortgaged freehold property to *B.*, and in 1832, being about to reside abroad, he gave a full power of attorney to the Defendant, who was a solicitor, to receive the rents and profits of all his property, and to apply them in payment of the incumbrances. In 1841 the Plaintiff settled accounts with the Defendant, shewing a large balance due to the Defendant, which the Plaintiff agreed to secure by a mortgage of his real estates when required. In 1845 the Plaintiff became bankrupt, but his assignee did not interfere with the mortgaged property, and the Defendant continued to receive the rents and profits. In 1849 the Defendant took a transfer himself of *B.*'s mortgage to which the Plaintiff was not a party. In 1865 the Defendant wrote a letter to the Plaintiff expressing his readiness to settle all accounts.

In 1877 the Plaintiff's bankruptcy was annulled, and the Plaintiff brought an action against the Defendant claiming to redeem the mortgage, and claiming an account against him as mortgagee in possession, and, by amendment, as agent and trustee for him. The Defendant pleaded the *Statute of Limitations* :—

Held (reversing the decision of *Hall*, V.C.), that on the Plaintiff's bankruptcy the Defendant ceased to be the agent and attorney of the Plaintiff, and did not become the agent of the assignee: and that even if the assignee would have been entitled to call upon the Defendant to account, the Plaintiff did not, on the annulment of the bankruptcy, succeed to the assignee's right; that, the Plaintiff's estate as mortgagor having ceased on the bankruptcy, the letter written to him in 1865 could not operate as an acknowledgment, either of his title or that of the assignee, to the equity of redemption, so as to take the case out of the *Statute of Limitations*; that as the assignee was barred by the statute the Plaintiff was also barred, notwithstanding the annulment of the bankruptcy.

The action was therefore dismissed with costs.

Whether an acknowledgment of the title of a mortgagor is effectual to take the case out of the *Statute of Limitations*, if it is not made till after the time limited by the statute has expired, *Quære*.

ON the 15th of September, 1828, the Plaintiff, *Mark Markwick*, mortgaged two houses in *Worthing*, Nos. 8 and 9 *Montague Place*, to Messrs. *Bailey* for a term of years to secure the repayment of £1000 and interest. He also deposited with them a policy of

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insurance on the life of his sister *Parnell Stafford*, in the *Atlas Company*.

In 1832 the Plaintiff, being about to reside abroad, executed to *W. H. Dennett*, one of the firm of *Whitter & Dennett*, Solicitors, a power of attorney, authorizing him to receive the rents and profits of all his property, and to apply the same in payment of any incumbrances, and as to the surplus, after deducting a fair sum as remuneration for himself, to apply the same in reduction of the principal money for the time being owing on such incumbrances.

On the 7th of June, 1841, the Plaintiff, having returned from abroad, signed a memorandum of that date, by which, after reciting that *Dennett* had delivered him an account current of the receipts and payments and other money transactions on his account, upon which there was a balance of £957 found to be due to *Dennett* on the 14th of October, 1840; and that a portion of such balance consisted of various sums of money advanced by *Dennett* to the Plaintiff out of moneys belonging to his sister *Henrietta Dennett* amounting to £496, for securing which the Plaintiff had executed a mortgage of certain property in *Worthing;* and that for further securing the remainder of the said balance the Plaintiff had proposed to give his promissory note payable three years after date; the Plaintiff undertook and agreed that he would, upon the request of *Dennett*, enter into and execute such deed or other instrument of assurance as *Dennett* might require for securing upon any real property which the Plaintiff might be or become entitled to, in possession, remainder or expectancy, the payment of the said sum of £460 with interest, and such further sum of money as might thereafter become due from the Plaintiff, and upon such security being given, *Dennett* undertook to extend the payment of the promissory note to a further period. The Plaintiff at the same time gave *Dennett* a promissory note for £460.

On the 4th of August, 1845, the Plaintiff was adjudicated a bankrupt, and *W. Cove* was appointed his creditors' assignee. *Dennett* was included in his schedule of creditors as an unsecured creditor for £360. The assignee did not in any way interfere with the mortgaged property, and *Dennett* continued to receive the rents as before. The bankruptcy was annulled on the 16th of July, 1877.

On the 30th of August, 1849, *Dennett* paid Messrs. *Bailey* the sum of £1000 and interest, and took a transfer from them of the mortgage on the Plaintiff's houses at *Worthing*. The Plaintiff was not a party to this transfer.

On the 10th of January, 1865, the Plaintiff wrote to *Dennett* a letter in which he said: "I would now like to take the property out of your hands, or rather pay you, for I must have an agent, and so wind up to our mutual satisfaction."

Dennett replied to this on the 1st of February, 1865: "It will give me, as I said before, infinite pleasure to wind up and close all accounts. My clerk will look into them and see how they stand at his earliest leisure."

In the year 1868 *Parnell Stafford* died, and *Dennett* received the sum of £1000 from the *Atlas Company* due on the policy on her life, together with £595 for bonuses.

On the 30th of July, 1877, the Plaintiff's solicitor wrote to *Dennett* a letter in which he gave him notice that the bankruptcy had been annulled, and that thereby all his estates had reverted to him, and asked him to deliver up all the deeds and securities in his custody relating to the houses No. 8 and 9 *Montague Place, Worthing*, and the other property comprised in the mortgage of the 15th of September, 1828, and various other houses which he mentioned, and asking for an account of all rents and other moneys received by *Dennett* on account of the Plaintiff, including the policy-money on the death of *Parnell Stafford*.

To this letter Mr. *Hardingham, Dennett's* solicitor, replied on the 29th of August, 1877, in a letter to the Plaintiff's solicitor, in which he said:—

"You are I believe aware that from advanced age and declining health Mr. *Dennett* some years since retired from general practice, and his papers then remained with Mr. *Tuckett*, who has since left *Worthing*, so that there is some difficulty in making out the accounts, but with the assistance he has now sought he hopes to accomplish that object, although it will take some time, and as soon as they can be got out and a balance arrived at you shall be favoured with them. Mr. *Dennett* is quite as anxious as your client Mr. *Markwick* can be that these accounts should be stated and adjusted as soon as possible, his lien satisfied, and a release

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given him by Mr. *Markwick*, and a reconveyance made of the mortgaged property (which is not quite accurately described in your letter) on closing the accounts."

W. H. Dennett died on the 3rd of September, 1877, and appointed the Defendants executors of his will.

The present action was commenced on the 19th of December, 1877, and the Plaintiff claimed to redeem the mortgage of the 15th of September, 1828.

The Defendants in their defence stated that *Dennett* had been in possession of the mortgaged property from the years 1849 until his death, and relied upon the *Statute of Limitations* as the bar to the action. They also relied on the *Statute of Limitations* as a defence to the claim so far as it related to the policy of assurance on the life of *Parnell Stafford*.

The Plaintiff amended his statement of claim, and by the amendments charged *Dennett* as having acted throughout as his solicitor and agent. This was denied by the Defendants in their amended statement of defence.

The motion came on for hearing before Vice-Chancellor *Hall* on the 4th of February, 1880.

W. Pearson, Q.C., and *J. W. Williamson*, for the Plaintiff.

Hastings, Q.C., and *T. A. Roberts*, for the Defendants.

HALL, V.C.:—

The case which has been brought forward in support of the defence, and which has been fully and ably argued by Mr. *Roberts*, is a very simple one. However, it appears to me that the arguments which have been addressed in support of that contention cannot prevail in the face of the letter of 1865 which is set out in the statement of claim. That letter is a letter from the mortgagee, Mr. *Dennett*, written within twenty years of the bankruptcy and of the transfer in reply to a letter of the 10th of January, 1865, from the Plaintiff to *Dennett*, in which letter he says that he will take the property out of their hands. Taking that letter in connection with the answer to it of the 1st of February, 1865,

there seems to me a claim on the part of the Plaintiff, admitted by the Defendant, to have back his property, which included the mortgage to *Dennett*, and there can be no question that the Plaintiff at that time had a right to redeem. That letter appears to me to have been a sufficient acknowledgment at that time by the Defendant that the Plaintiff was entitled to redeem. I think there can be no question as to that. That being so, there can be no doubt as to that letter without going into the subsequent letter of the 29th of August, 1877, as to the efficacy of which there might perhaps be some question raised. That Mr. *Hardingham* had authority to write that letter, I think is plain, indeed the contrary has not been suggested. It is said that his client, Mr. *Dennett*, was very ill and was unable to attend to business, and therefore that he could not have written such a letter himself, and that the person writing that letter is not to be considered as writing it so as to affect his principal. A man may be very well able to instruct an agent to write for him, and, not only so, but be able to give him instructions, although he might not be able to draw the letter. It appears to me that the authority was given. Then, the authority being given, there might still be questions arising upon that—questions which have not been argued before me, and which perhaps are not thought worth arguing; for instance, whether an acknowledgment by a duly authorized agent would suffice. It seems to me unnecessary to go into that, or to consider in fact the sufficiency of the acknowledgment of the 29th of August, 1877, because I think the acknowledgment of the letter of 1865 is sufficient.

The only observation I will make on the letter of August, 1877, is this, that at all events it has considerable cogency in a moral point of view, whatever its legal efficacy may be. I apprehend the question might have been of some importance in fact as reflecting on or being taken in connection with the earlier letter of 1865, and with other letters which have been put in evidence, in which the Plaintiff was pressing for accounts. I think it shews that the Plaintiff's case cannot be considered a mere afterthought, or practically as a stale demand; at all events, after this letter of 1865, and the other letters which have been put in evidence, I cannot adopt this view.

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Now, as I have said, the view which I take of the matter is this, that that letter of 1865 must be allowed to speak for itself. There are other considerations which have passed through my mind. For instance, whether a person filling the position which this gentleman did, he being solicitor and agent at the same time, could take a transfer of the mortgage and hold a power of attorney for the purpose of managing the Plaintiff's affairs and acting for him, and then, after having for some period of time applied the rents in keeping the interest down on the mortgage and paying the premiums on the policy—for he was agent of the Plaintiff for other property besides this mortgaged property—set up the *Statute of Limitations:* whether a person filling that position could be said to have fully discharged his duty by allowing the mortgage to go on and permitting the statute to run without seeking to acquaint his client of the circumstance that the statute was running, and that after a certain time he would be debarred from claiming the property by reason of it.

On the whole, it seems to me that the objection with regard to the *Statute of Limitations* cannot avail the Defendants as a defence to this action, and therefore that the Plaintiff is entitled to the ordinary decree in a redemption action, with the consequent accounts.

C. A.

From this judgment the Defendants appealed. The appeal came on to be heard on the 1st of July, 1880.

Hastings, Q.C., and *T. A. Roberts*, for the Appellants:—

The Plaintiff contends that the power of attorney given to *Dennett* in 1832 was in force till the transfer of the mortgage, on the 30th of August, 1849. But the Plaintiff became bankrupt in 1845, which would determine the power. Moreover, it was only a power for management of the Plaintiff's affairs while he was abroad. He came home and resumed the management of his affairs, which by itself would determine the power. *Dennett*, therefore, remained in possession not as agent but as mortgagee.

At the time when the correspondence of 1865 on which the Plaintiff relies took place, the Plaintiff had no interest, for he was an uncertificated bankrupt, and the acknowledgment was not

given to the right person so as to satisfy 3 & 4 Will. 4, c. 27, s. 28: *Batchelor* v. *Middleton* (1).

[JAMES, L.J.:—Is there any authority on this point? Property of the bankrupt being heavily mortgaged the assignee in bankruptcy does not think it worth while to claim it. Can he abandon it? He left the bankrupt in possession. Could not the bankrupt deal with it as his own?]

We submit that something more is necessary to give the bankrupt any title. The acknowledgment must be given to the owner of the equity of redemption. *Moodie* v. *Bannister* (2); *Baker* v. *Wetton* (3); *Lucas* v. *Dennison* (4); *Richardson* v. *Yonge* (5). In this case the vesting of the bankrupt's estate in the assignees took place under 1 & 2 Will. 4, c. 56, s. 26. It would seem that under the old Acts the annulling the bankruptcy would revest the bankrupt's estate in him except so far as is provided for by 6 Geo. 4, c. 16, s. 87, and revesting is provided for by 32 & 33 Vict. c. 71, s. 81; but in the meantime the property is out of the bankrupt and he is a stranger.

[THESIGER, L.J.:—In the *Bankruptcy Act* of 1849 (12 & 13 Vict. c. 106), s. 145, the Legislature appears to assume that there must be an election by the assignee before property vests in him.

JAMES, L.J.:—An equity of redemption is not onerous property.]

The mortgagor having parted with his property ceased to be the person to whom an acknowledgment could be given. We contend further that the letters of the 10th of January, 1865, and the 1st of February, 1865, are too vague to be a sufficient acknowledgment. The letter of the 29th of August, 1877, was written without *Dennett's* authority, and after his title to the estate had become absolute.

W. Pearson, Q.C., and *J. Williamson*, for the Plaintiff:—

The Plaintiff's case does not rest solely on the relations between mortgagor and mortgagee. An agent who is in possession as

(1) 6 Hare, 75, 83.
(2) 4 Drew. 432, 444.
(3) 14 Sim. 426.
(4) 13 Sim. 584.
(5) Law Rep. 6 Ch. 478.

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such, takes a transfer of a mortgage and remains in possession as he was before. He must be considered to remain in possession as agent. *Dennett* took possession under the power of attorney and was never out of possession. The bankruptcy did not determine the agency. The *Statute of Limitations* is therefore no bar to the Plaintiff. But if the Defendants are at liberty to set up the statute, the letter of the 1st of February, 1865, was a sufficient acknowledgment to take the case out of the statute. The assignee in the bankruptcy made no claim to it, and the Plaintiff all along had a modified interest in the property, for he was entitled to the surplus of his estate, if any. At all events the bankrupt was the agent of the assignee so long as the assignee refrained from interfering with the equity of redemption: *Trulock* v. *Robey* (1); *Stansfield* v. *Hobson* (2); *Prance* v. *Sympson* (3).

[THESIGER, L.J.:—The alleged acknowledgment of 1877 was given after the mortgagee had been in possession more than twenty years. Has there been any judicial decision that an acknowledgment after that time has any effect?]

In several of the decided cases the acknowledgment was after twenty years; and it appears to have been taken for granted that it was sufficient.

The annulment of the bankruptcy has a retrospective effect, and the mortgagor's title remains as if it had never been displaced. Therefore the acknowledgment to him was confirmed: *Ex parte Jackson* (4); *Ex parte Leaverland* (5); *Ex parte Wood* (6); *Ex parte Edwards* (7); *Ex parte Smith* (8); *Smallcombe* v. *Olivier* (9); *Herbert* v. *Sayers* (10); *Bailey* v. *Johnson* (11).

Hastings, in reply, as to the fiduciary relation of *Dennett*, referred to *In re Alison* (12); *Wellesley* v. *Wellesley* (13); *Drew* v. *Nunn* (14); and as to the effect of the acknowledgment, to *Crew* v. *Terry* (15);

(1) 12 Sim. 402.
(2) 3 D. M. & G. 620.
(3) Kay, 678.
(4) 8 Ves. 533.
(5) 1 Atk. 145.
(6) Ibid. 221.
(7) 10 Ves. 104.
(8) Buck, 262, n.
(9) 13 M. & W. 77.
(10) 5 Q. B. 965.
(11) Law Rep. 6 Ex. 279; Ibid. 7 Ex. 263.
(12) 11 Ch. D. 284.
(13) 4 My. & Cr. 561.
(14) 4 Q. B. D. 661.
(15) 2 C. P. D. 403.

Locking v. *Parker* (1); *Incorporated Society* v. *Richards* (2). The last mentioned case is an authority that acknowledgment after twenty years is too late.

1880. August 3. JAMES, L.J., delivered the judgment of the Court (*James*, *Cotton*, and *Thesiger*, L.JJ.).

[After stating shortly the facts of the case previous to the bankruptcy, his Lordship continued:—]

By the accounts rendered in the bankruptcy the Plaintiff appears to have been hopelessly insolvent. But few creditors proved, and no dividend was paid. In the statement of assets and liabilities the property in question is stated as part of the property in the hands of creditors, and it is stated to yield a small surplus of annual income after paying the interest and premium and other outgoings. Seeing it was house property, liable to all the vicissitudes and changes of such property, the margin of income and the probable excess of value over the incumbrances were so trifling and problematical, that the assignee appears to have reasonably thought the asset practically worthless, and he abandoned it to its fate. Mr. *Dennett* was thereupon allowed by the assignee to remain in the receipt of the rents and profits, and he and his representatives have been, and the latter are now, in such receipt.

In the year 1849, Mr. *Dennett* took an assignment of the *Bailey* mortgage. Nothing appears to have occurred till the year 1865. Early in that year, and therefore not quite twenty years after the bankruptcy, the Plaintiff wrote to Mr. *Dennett* and received a reply. The letter and answer are as follows:—[His Lordship read the letters of the 10th of January, 1865, and the 1st of February, 1865.] Another long lapse of time occurred, and then further correspondence took place, the material part of which was as follows:—[His Lordship read portions of the letters of the 30th of July, 1877, and the 29th of August, 1877.]

In the year 1877 the Plaintiff succeeded in getting his bankruptcy annulled, and towards the close of the same year he commenced this action against the Defendants, the representatives of Mr. *Dennett*, who had in the meantime died at a very advanced age. In the writ it is stated to be an action for redemption

(1) Law Rep. 8 Ch. 30. (2) 1 Dr. & W. 258, 289.

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of the mortgage security, a common action by mortgagor against mortgagee. In the original statement of claim that is the only case stated, the mortgage to *Bailey* and the assignment to *Dennett*. The defence put in was the length of possession and the *Statute of Limitations*.

There was no reply to this. But an amended claim was filed wholly omitting the relation of mortgagor and mortgagee, and making this new case, that Mr. *Dennett's* position throughout was that of solicitor and agent to the Plaintiff; that as his solicitor and agent he entered into and continued in the receipt of the rents and profits, and as his solicitor and agent took the transfer of the mortgage security in question. That is to say, that on the transfer Mr. *Dennett* became trustee for the Plaintiff, with a lien only on the property for what might be due to him on the final settlement of his accounts. This relation and this case are wholly different from the original relation set up and the original case made. This amended claim makes no mention of the bankruptcy, and no mention of the securities given to Mr. *Dennett* and his sister. To this amended claim the Defendants answered by stating the bankruptcy. And the Plaintiff contented himself with replying annulment of it. There is no evidence that the relationship of principal and agent continued after the bankruptcy, or of the fact that Mr. *Dennett* took the assignment of the mortgage as such agent—that is to say, as trustee of the Plaintiff. The Plaintiff himself, it is true, has so sworn in the very words of his amended statement of claim. But it is impossible to accept this as any evidence of the fact. It is not suggested that any communication, written or oral, ever passed on the subject between the Plaintiff and Mr. *Dennett* that there was any renewed retainer of Mr. *Dennett* as solicitor, or any renewed employment of him as agent after the bankruptcy. And it is obvious that the Plaintiff's statement is only a statement of his notion of the legal result to be inferred from the fact that Mr. *Dennett* continued *de facto* in the receipt of the rents which he had originally commenced as such solicitor and agent. But the bankruptcy absolutely determined the retainer and employment of Mr. *Dennett*, unless it was expressly or impliedly renewed. And no such renewed employment of Mr. *Dennett* to receive the rents could have been lawfully

made. A mortgagor is no doubt entitled to receive by himself or his agent the rents of the mortgaged property, unless and until the mortgagee elects to receive them himself. But a bankrupt mortgagor has no such right; he is a mere stranger, his receipt could be no discharge to the tenants, and as the Plaintiff could not himself have received, he could not have authorized Mr. *Dennett* to receive them.

In some cases with respect to dealings and transactions of a bankrupt after the bankruptcy he may, with the acquiescence of the assignee, or until the latter interferes, receive, and even sue. But this does not apply to the rents of the real estate which had by the bankruptcy become actually vested in the assignee. The fact that the latter did not choose to trouble himself with the possession of an estate so encumbered as to be profitless to the creditors, and therefore practically abandoned it to the incumbrancer, gives no more authority to the bankrupt than it could to any stranger to receive the rents.

Mr. *Dennett's* original employment was not a gratuitous one, and it is in the highest degree improbable that he would accept a retainer or engagement from an insolvent person (who could give him no practical right to remuneration) to receive rents which he could not lawfully receive or lawfully retain or apply. And it is in the highest degree improbable that Mr. *Dennett* should, as the agent or solicitor of such a person, advance the moneys to pay off the original mortgage without any prospect of profit or remuneration. But when Mr. *Dennett's* position, as the solicitor who had advanced his sister's money on a second mortgage, and had himself an equitable incumbrance, is considered, it is to be presumed, and it is reasonably certain, that (having ceased in point of law to be the agent of the mortgagor) he received the rents, and afterwards took an assignment of the prior mortgage in the interests and for the protection of his sister and himself. He was in the bankruptcy in the actual receipt of the rents and profits, and the assignee could not have taken the property out of his hands without paying him what was due. It may be suggested that his continued receipt was as agent for the assignee in bankruptcy. But the relation of principal and agent requires the consensus of both parties, and there is no evidence and no probability that the

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assignee ever expressly, or impliedly, or by subsequent ratification, assented to that relation. And it is reasonably certain that he did not. It may be further suggested on the evidence of Mr. *Dennett's* letters that he considered himself liable to account to the assignee in respect of the property, viz., as agent; that the assignee might have assented to this view, and so ratified the agency, and that the Plaintiff, by reason of the annulment of the bankruptcy, has now the same right that the assignee had, and may call for an account of the agency. It is difficult to give such an effect to the annulment. The annulment re-vested in the bankrupt so much of his assets as was in specie and available at the time of such annulment, but it is not easy to see how it can make the ex-bankrupt the legal representative of the assignee, so as to transfer to him the right of adopting and ratifying the supposed agency. Moreover, the letters do not amount to any recognition of such supposed agency or liability to account. Mr. *Dennett*, after the assignment of the mortgage, was mortgagee in possession, and the assignee was mortgagor. Prior to the bankruptcy he had been in the management of the property and the receipt of the rents and profits; and the letters might have referred, and it is to be presumed and inferred that they did refer, not to an agency which had never been constituted in fact, but to such liability as he was or had been actually under as such past agent and such mortgagee in possession.

The case made by the amended statement of claim that Mr. *Dennett* took the assignment of the mortgage, and received the rents and profits as solicitor and agent of the Plaintiff, or that any relation of principal and agent existed after the bankruptcy, has entirely failed.

But there remains to be considered the question whether the Plaintiff is entitled to relief as between mortgagor and mortgagee, which is the relief which the Vice-Chancellor has given him. There is considerable difficulty in this in the way in which the Plaintiff has presented his case on the pleadings. On the answer coming in he abandons this case and substitutes for it the case of principal and agent, of trustee and *cestui que trust*, which has been dealt with, and does this apparently by way of escaping from the statutory bar set up to the suit as a redemption suit. Now if the

case had been simply this; if the Plaintiff had said, I was owner of the equity of redemption of certain property, and you, as my agent on my behalf, took an assignment of the mortgage, and the Defendant had said, "No, I took it not as your agent, but for myself and on my own behalf," there would be no reason why the proper relief should not be given according to the Defendant's version of the fact. But where the Defendant goes on to say, I not only took the mortgage myself, but by length of possession I have acquired an irredeemable and indefeasible title to it, it is then incumbent on the Plaintiff to meet this by distinctly averring an acknowledgment sufficient to avoid the statutory bar which, *primâ facie*, the length of possession would create, and putting it distinctly in issue so as to enable the Defendant to come to the trial prepared to meet it. No such case is put in issue on these pleadings. It is true that some letters of Mr. *Dennett* are set forth in the amended statement of claim, but not by way of reply to a defence set up to the redemption suit which had been abandoned, but in support of the case of agency and trust which had been substituted. But assuming that we have all the evidence forthcoming that it is now possible to have, and that we can and ought to deal with the facts on the assumption that everything had been properly pleaded, how does the case stand? It is to be assumed and inferred that the possession of Mr. *Dennett*, either on behalf of his sister or as equitable incumbrancer, did not begin until, but did begin, on the bankruptcy, that is to say, in August, 1845. But, further, whatever was the character of that possession it cannot be united with the possession after he became by the assignment of the *Bailey* mortgage the legal owner. From that time he became mortgagee in possession with all the legal rights and equitable incidents of that character including the liability to redemption. It is material to observe this, in order to dispose of what was pressed on us in the argument, that the Defendant could rely on his length of possession from an earlier time as giving him a title under the 28th and 34th sections of the *Statute of Limitations*, which contention is not to be maintained.

It is impossible to hold, as was contended by the Defendants, that the right of the Plaintiff was barred when the letters of January and February, 1865, were written. At that time the

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Plaintiff was in point of law a stranger to the property. He had been mortgagor, but if the estate of a mortgagor has become by his own act, or by the operation of law, vested in some one else, it would be an absurd and inadmissible construction of the section of the *Statute of Limitations* to consider him a mortgagor capable of receiving an acknowledgment of a title to redeem. A statement to *A.*, or a communication with *A.*, from which it is to be inferred that *B.* has a right to redeem, is not an acknowledgment of *A.'s* right, nor is it an acknowledgment to *B.* Nor is it the more so because *A.* had many years previously been the original mortgagor. Can it then be considered as an acknowledgment made to the bankrupt as agent to the assignee of his estate? It is quite clear that the Plaintiff did not correspond with Mr. *Dennett* in any such character or with any such intention, or with any authority express or implied from his assignee. Is it possible to connect the correspondence between the Plaintiff and Mr. *Dennett* with the former's subsequent acquisition by reverter of his estate through the annulling of the bankruptcy? We are unable to find any legal principle on which such connection can be made. If the bankruptcy had not been annulled, could the assignee have used the correspondence to maintain, or could he otherwise have maintained, a suit for redemption when the Plaintiff commenced his action? We think clearly that he could not. Nothing could revert to the Plaintiff but what was in the assignee, and therefore no right to redeem reverted. On the whole, therefore, the Plaintiff's case in every point of view has failed, and this action must be dismissed with costs.

Solicitor for Plaintiff: *G. Thompson.*
Solicitor for Defendant: *Hardingham.*

In re WRECK RECOVERY AND SALVAGE COMPANY.

C. A.
1880
V.-C. M.
April 29;
June 24.
C. A.
June 30.

Company—Winding-up—Power of Liquidator to continue Business of Company—Fresh Contracts—Companies Act, 1862, *s.* 95.

In order to give the Court jurisdiction to sanction a contract by the liquidator in carrying on the business of the company under the 95th section of the *Companies Act*, 1862, it must be shewn that its object is the beneficial winding-up of the company, and that it is highly expedient for that purpose. Therefore, where the object of a proposed business contract was to facilitate the reconstruction of the company :—

Held (reversing the decision of *Malins*, V.C.), that the Court had no jurisdiction to sanction the contract.

17 Ch D. 38

THE *Wreck Recovery and Salvage Company* was registered as a limited company for the purpose of working a method invented by Mr. *Albert Leutner* for raising sunken vessels. The company was not successful, and a petition was presented by some of the creditors for the winding-up of the company. The petition was heard before Vice-Chancellor *Malins* on the 5th of December, 1879, when it was suggested that some of the shareholders desired to effect a reconstruction of the company; and his Lordship accordingly ordered the petition to stand over in order that meetings might be held for ascertaining the wishes of the creditors and shareholders on the subject.

Separate meetings were accordingly held of the creditors and the shareholders on the 22nd of December, 1879, which were respectively adjourned to the 5th and 6th of January, 1880. The result was that both the shareholders and creditors passed resolutions that the company ought to be wound up, and on the petition coming on again an order was made by the Vice-Chancellor to that effect.

The company was possessed of a steam-launch and several pontoons and other vessels and machinery for the purpose of raising sunken ships, and proposals were made by Mr. *Leutner*, who was a large shareholder in the company, to Mr. *Broad*, the official liquidator, that he should have the use of the company's vessels and plant in order to raise at his own risk certain wrecks which

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were sunk off *Dover*, in order to demonstrate the feasibility of his process and the value of the company's plant.

An agreement was accordingly prepared between the official liquidator and *Leutner*, which recited that certain vessels called the *Grosser Kurfurst*, *Alpha*, and *Harlinger*, with their cargoes, were submerged near *Dover;* and that *Leutner*, being a large shareholder in the *Wreck Recovery and Salvage Company*, and otherwise interested therein, was desirous that the said company should be resuscitated, whereby the shares of the said *A. Leutner* and other shareholders might become of value, and had proposed that the liquidator of the said company, with a view of facilitating the reconstruction of the said company, with the sanction of the Vice-Chancellor, should raise or attempt to raise the *Alpha* and the *Harlinger* by the vessels and plant of the company at the expense of the said *A. Leutner:* it was agreed that, with the sanction of the Vice-Chancellor, the liquidator should provide crews and divers to go with the vessels and plant of the company to raise the two ships the *Alpha* and *Harlinger*, and that *Leutner* should have the control of the experiment, and should pay all wages and expenses of the experiment; and that he should continue the operation for two months; and if he succeeded in raising the ships or certain of them, the profit was to be paid to the liquidator.

The liquidator then applied to the Vice-Chancellor for his sanction to the scheme. The application was accompanied by an affidavit by Mr. *Broad*, in which he stated that *A. Leutner* was a large shareholder in the company, and with a view to resuscitating the said company had requested him to apply to the Court for leave to use a portion of the plant and appliances of the company for the purpose of attempting to raise the *Alpha* and the *Harlinger;* that he had carefully considered the terms of the said proposal, and was of opinion, having regard to the fact that there were numerous shareholders anxious to reconstruct the said company, and who before coming forward were waiting to hear of a successful experiment having been made by means of the company's vessels and appliances, that the proposal made by *Leutner* was a beneficial one for the company, and also, in the event of an ultimate sale of the company's plant, it would, of course, be more

advantageous to the company to sell the said plant, as a going concern.

On the 9th of April, 1880, the Vice-Chancellor sanctioned the agreement; but two of the creditors moved for an injunction to restrain the liquidator from carrying out the agreement, and for an order for the immediate sale of the company's vessels and plant.

On the 29th of April, the Vice-Chancellor ordered the motion to stand over, and directed a circular to be sent to all the creditors of the company to ascertain their wishes upon the subject.

The motion came on again on the 24th of June, when it appeared that the answers of a majority of the creditors, both in number and value, were favourable to carrying out the agreement.

J. Pearson, Q.C., and *Grosvenor Woods*, for a dissentient creditor:—

The effect of acting upon this agreement, and allowing Mr. *Leutner* to carry out further experiments for raising vessels by means of his invention, will be to delay the sale of the plant and effects of the company, and thereby to prejudice the interests of the creditors. If the plant is sold at the present time, the proceeds will be sufficient to pay all the creditors of the company, but if the sale should be postponed, the probability is that it will not realize so much. The dissentient creditors, for whom we appear, have no faith in the success of the experiments, and we therefore desire an immediate sale. There has been no doubt a majority of the creditors in favour of further experiments, but if the votes of Mr. *Leutner* are struck out, who is a party interested in carrying out his own views, the majority will be very slight, and the interests of the minority ought not to be sacrificed.

Glasse, Q.C., and *Cracknall*, for the other dissentient creditor.

Higgins, Q.C., and *Everitt*, for the official liquidator:—

The fullest investigation upon the subject of these experiments has been made by Mr. *Broad*, the official liquidator, who has formed the opinion that if Mr. *Leutner* is allowed to carry his experiments still further with increased and more efficient appliances, there is a fair prospect of his succeeding.

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The expense of the experiments will be borne by Mr. *Leutner* himself, and the liquidator will see that the money is secured beforehand; therefore it is a mere question of delay in the sale of the plant for some four or six weeks, which cannot affect the amount likely to be realized, and it was the understanding of all parties that the question was to be decided by the wishes of the majority.

F. Tomkins, for *Leutner*.

MALINS, V.C.:—

There were three petitions to wind up this company, one by the company and two by creditors, and I made a compulsory order on the 23rd of January last. It then appeared that the company was formed for the very laudable object of recovering sunken ships, and particularly the *Grosser Kurfurst*, which was sunk near *Dover*, and two ships called the *Alpha* and the *Harlinger*. Of course, if they could, by these appliances, raise such a vessel as the *Grosser Kurfurst*, they could raise any ship that ever floated on the sea. A great number of shareholders were attracted by the advertisements, and some of them, I recollect, complained of the deficiency of the means employed. After the order to wind up was made, Mr. *Broad* was appointed liquidator, and I desire to say of him that he has acted frequently in cases as liquidator in this branch of the Court, and I have always found him a man of business, and desirous of doing that which is the duty of every liquidator, namely, to do the best he can for the persons interested. The only people interested, in this case, are the creditors. There have been great attacks made on the integrity of Mr. *Leutner*, but I am not satisfied that he is otherwise than a man of integrity, though, like all other patentees, he is fond of his own patent and his own scheme. He seems to be as sanguine about it as projectors usually are; but Mr. *Leutner* is a large creditor of this company, although not technically admitted to be so. A proposal has been made by him to the liquidator that in order to prove the efficiency of his own mode of raising the wrecks, and the sufficiency of the plant, an experiment should be made wholly at the expense of Mr. *Leutner*. Now, what is the inconvenience or dis-

advantage which the company are called on to suffer by that? This experiment is to be made, which, if it is successful, may have the most material influence on the prospects of this company, in allowing that which has hitherto been unsuccessful to become successful. That is the advantage which the company or the creditors may derive. What is the disadvantage? The only disadvantage suggested, is the delay in realizing these assets for some six or possibly seven weeks, because the experiment, it is said, will commence forthwith, that is, at a favourable state of the tide, and, as every one knows, in the course of a fortnight you have every stage of the tide, and the commencement will not be delayed more than a fortnight, and the operation cannot take more than six weeks. The disadvantage to the company, therefore, is the delay for six or eight weeks in realizing this plant, and when realized, it will produce a very small dividend for the creditors. Therefore, if Mr. *Pearson's* client, who is a creditor for £400, and Mr. *Glasse's* client, who is a creditor for £114, take the advantages they will receive if everything were now realized, and take the disadvantage of delay for six weeks and look at both, what does it come to? Take the disadvantage, namely, the delay of six weeks, and set that off against the advantage, which will be very considerable, if the experiment succeeds.

Now, finding the strong opinion again and again expressed when the matter was last before me on the 29th of April, I had the official liquidator examined. He said that he had consulted very experienced persons, who were of opinion that these experiments were likely to be successful. What can be the disadvantage of it? All the experiments are to be paid for by Mr. *Leutner*, and Mr. *Broad* says he shall not allow the experiments to commence till the money is forthcoming. Of course if Mr. *Broad* allows the experiment and does not get the money, he will have to bear the loss, and therefore all the experiment is to be carried on at the expense of Mr. *Leutner*. Inasmuch, therefore, as the representatives of the creditors were in favour of this, I thought it was a matter to be decided by the creditors themselves. I am bound by the Act of Parliament to regard the wishes of the creditors, and ordinarily I should have directed a meeting to be called, but I thought it was convenient that a circular should be issued, and

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I referred it to Chambers to settle a circular to be issued to every creditor. It is said that two did not receive it, but what the cause of that was I do not know—at all events, the great body of the creditors did receive the circular, and they were asked to say whether they supported this experiment or not. Now, what is the result? I indicated that the majority of the creditors were to decide the case, and it was my distinct intention, and everybody knew it, that if the majority of the creditors were in favour of the proposal of the liquidator, I would sanction it. Now, I take the statement I am about to give from Mr. *Pearson*, and what is it? First he says I must exclude Mr. *Leutner*. I am by no means prepared to say that I assent to that. He is a large creditor and has a large interest, and if Mr. *Leutner* thinks his interests are to be promoted by this experiment I do not see why he should not advocate it, and I do not see that that is a reason for totally disregarding him as a creditor. But, assume it to be so, how does it stand? The answers of the assenting creditors are £2312. Those who do not assent are £1900, and on a question of this kind I must take them as assenting, just as in the House of Assembly absent members are not considered as dissentients, that is, if they do not give their vote. Therefore, if they do not dissent, I am fairly entitled to treat them as assenting. Therefore I have as assenting £4212. Then there are five debenture holders, all of whom assent, and they amount to £3620. Mr. *Pearson* again says, You must throw over the debenture holders. I confess I could not follow his reasoning; they are debenture holders, and probably entitled to the whole assets of the company. Adding the debenture holders there are £7832. Now, the dissentients are £2480, and then there are *Lister* and *Perkins*, who are not admitted, for £400. Therefore I have the judgment of the liquidator, to which I attach importance, because I think he is anxious to do what is best for the company, and I have the opinion of a majority of the creditors, namely £7832 against £3200, in favour of this operation. Under these circumstances I do that now which I much regret having been prevented from doing much earlier, for as early as the month of April this matter was brought before me in Chambers, and all that could fairly be urged was urged. What has taken place since has not advanced justice at all. I then observed on

the operation, and I was of opinion then, as I am now, that this experiment ought to be made. I think that the motion should never have been brought before me. Apart from that, I am satisfied that what I decided in Chambers was right. The dissentients persisted in bringing it into Court, and, having done so, they have caused needless expense to the other side, and I refuse the motion with costs.

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From this decision the applicants appealed. The appeal was heard on the 30th of June, 1880.

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J. Pearson, Q.C., and *Grosvenor Woods*, for the Appellants:—

The Vice-Chancellor had no jurisdiction to sanction the agreement with *Leutner* unless it comes within the 95th section of the *Companies Act*, 1880, by which power is given to the official liquidator, with the sanction of the Court, "to carry on the business of the company so far as may be necessary for the beneficial winding-up of the same." In the first place, this agreement is not for the beneficial winding-up of the company, but in order to enable the shareholders to resuscitate it; in the second place, it is a contract to undertake fresh business, which the Court never allows liquidators to do: *In re East of England Banking Company* (1). If the experiment to raise the ship fails the plant will be much depreciated in value; and if it succeeds the creditors will not be benefited by it.

[They were stopped by the Court.]

Higgins, Q.C., and *Everitt*, for the official liquidator:—

The word "necessary" in the section must have a reasonable interpretation. It means what is highly expedient; and the agreement in the present case satisfies that condition. It is highly expedient with regard to the interests of the creditors as well as of the contributories, that the business of the company should be sold as a going concern. It is also very important that it should be shewn by actual experiment that the plant of the company is valuable and the scheme practicable. At present the plant

(1) Law Rep. 4 Ch. 14.

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is practically unsaleable. It is true that it is intended to reconstruct the company and to sell the plant and vessels to the new company, but that is all included in the winding-up, within the meaning of the section.

It is not necessary that the contract proposed to be undertaken by the liquidator should be a contract commenced before the winding-up. If the company were a mercantile company it would be impossible to carry on the business at all, however necessary it might be to do so, without entering into fresh contracts for the purchase or sale of goods. The Courts have never construed the section so strictly as that. In *In re East of England Banking Company* (1) the liquidators had altered the liabilities of the bank towards the depositors, which they had no power to do. In the present case the contract is a mere continuance of the business in which the company was engaged, and the company is guaranteed by *Leutner* against all risks. A majority of the creditors, and all the debenture holders, were in favour of the liquidator's proposal.

JESSEL, M.R.:—

The question in this case is one of considerable importance with respect to the jurisdiction of the Court, though it is probably of very little importance in this particular case. The 95th section of the *Companies Act*, 1862, on which the question turns, contains the following enactment: "The official liquidator shall have power, with the sanction of the Court, to do the following things" (among others): "To carry on the business of the company so far as may be necessary for the beneficial winding-up of the same." Now the word "necessary" means that it must not be merely beneficial but something more, though the necessity must be determined by the Court, having regard to all the circumstances of the case. It does not, of course, mean that no other course would be possible. Then it must be for the "beneficial winding-up" of the business of the company, therefore it must be with a view to the winding-up of the company, not with a view to its continuance. The only question which it is necessary for us to decide, and the only question which I mean to decide, is, whether

(1) Law Rep. 4 Ch. 14.

this agreement was made with a view to the benefical winding-up of the company, or with a view to the winding-up at all.

I must say that, looking at the agreement and at the affidavits, I cannot find anything to shew that what was proposed was intended to forward the beneficial winding-up of the company, or, indeed, for the winding-up at all. The recital says that *Leutner*, as a large shareholder, was desirous that the company should be resuscitated, whereby the shares might become of value. It is plain that it was an attempt to make the shares of the company of value. It is admitted that this is a creditors' winding-up, and that there will be no surplus for the shareholders, and the object of the agreement is, no doubt, as stated, to make an experiment for two months with the plant of the company, with a view of making the shares of value, so as, if possible, to resuscitate the company. The liquidator, in his affidavit, does not say that he cannot sell the plant now at a good price. It was suggested in argument that this was so, but there is no evidence of it. The liquidator gives a very cautious opinion. He says that, "with a view to the resuscitation of the company," *Leutner* had requested him to apply for leave to use a portion of the plant of the company, and then he says, "I am of opinion, having regard to the fact that there are numerous shareholders anxious to reconstruct the company, and who, before coming forward, are waiting to hear of a successful experiment having been made by means of the company's vessels and appliances, that the proposal made by *A. Leutner* is a beneficial one for the company." But, on the other side, if the experiments should fail, the plant will certainly be diminished in value, and no doubt that is the reason why the liquidator gives so cautious an opinion. Then he says: "Also, in the event of an ultimate sale of the company's plant, it would of course be advantageous to sell the said plant as a going concern." Looking at this affidavit, is it possible to say that the case comes within the 95th section? There is no attempt to shew that the agreement is necessary for the beneficial winding-up of the company, but only that it will be beneficial for rendering the same more valuable. Without saying whether, in a proper case, there is any limit to the power of the Court as to permitting the liquidator to enter into new contracts or to carry on the business with

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a view to its being sold as a going concern, it appears to me that the present case is not within the purview of the Act, and that the order of the Vice-Chancellor must be discharged.

COTTON, L.J. :—

I am of the same opinion.

THESIGER, L.J. :—

I am also of the same opinion. The order appealed from is made under the 95th section of the *Companies Act*, 1862, and as such it cannot be supported. I think that the section should be construed in a liberal sense; and I agree with the Master of the Rolls that we are not to take the word "necessary" as importing an absolutely compelling force, but what may be called a mercantile necessity, something which would be highly expedient under all the circumstances of the case for the beneficial winding-up of the company. But, taking this view of the section, the evidence is not sufficient to support the jurisdiction of the Court. Upon the face of the contract and the affidavit, what is proposed is an experiment, not with a view to the beneficial winding-up of the company, but with a view to the benefit of the shareholders and to reconstruct the company.

The creditors have a perfect right to object that the winding-up can be carried on quite as well without this contract; and that there is nothing to shew that it is necessary or highly expedient for that purpose.

The order is not within the 95th section, and must be discharged.

Solicitors: *Snell & Greenip; Lowless, Nelson, & Co.*

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[1870 A. 14.]

C. A.
1878
V.-C. M.
June 20, 24, 25.
C. A.
1880
March 23; *July* 9.

Charity—Mortmain—Bequest of Share in Partnership Property—Land held for Partnership Purposes—9 Geo. 2, c. 36.

A testator, who was a partner in a mercantile firm, gave the proceeds of the sale of his share of certain real estate which was held as partnership property to charitable uses:—

Held (affirming the decision of *Malins*, V.C.), that the interest of the testator in the partnership property, so far as it comprised moneys arising from the sale of the real estate, was an interest in land under the *Mortmain Act*, and that the bequest of it was void.

Brook v. *Badley* (1) followed.

Myers v. *Perigall* (2) and *Attree* v. *Hawe* (3) distinguished.

THIS action was brought for the administration of the estate of Mr. *John Dawson*, of *Bacup*, in the county of *Lancaster*.

The testator at the time of his death carried on the business of a cotton manufacturer in partnership with Mr. *John Howarth*, under the firm of *Dawson & Howarth*. The business was carried on in two mills, called the *Higher Mill*, which was leasehold for a long term of years, and the *Lower Mill*, which was copyhold of inheritance. The partnership was by parol and at will: and the partners were interested in the business in equal shares.

The two mills, with the machinery, trade, and other fixtures, were held as part of the partnership property. The legal estate in the *Upper Mill* was vested in the two partners as joint tenants: and they had been admitted to the *Lower Mill* as tenants in common in equal shares.

By his will, dated the 1st of June, 1857, the testator, *J. Dawson*, after appointing five persons, one of whom was his partner *J. Howarth*, his executors, devised and bequeathed all his moiety or equal part or share or other his part or share of the mills called the *Higher Mill* and the *Lower Mill*, and also all his moiety or equal half-part or other his part or share of the steam engines, machi-

(1) Law Rep. 3 Ch. 672. (2) 2 D. M. & G. 599.
(3) 9 Ch. D. 337.

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nery, stock-in-trade, goods, merchandise, chattels, and effects, whatsoever then or thereafter to be erected in, affixed to, or connected with the same mills, or either of them, to three trustees therein named, their heirs, executors, administrators, and assigns, according to the nature thereof respectively, upon trust with the consent of the said *John Howarth*, and in the discretion of his trustees or trustee, either to discontinue his business of a cotton manufacturer as then carried on in partnership with *J. Howarth* under the firm of *Dawson & Howarth*, or to carry on the said business or cause it to be carried on under their inspection and control for any number of years they might think proper, and upon further trust in the discretion of his trustees or trustee to enter into any arrangement with *J. Howarth* for succeeding to his share in the partnership, and for that purpose to sell his share in the mills, machinery, and other partnership property to *J. Howarth* in manner therein mentioned, but if they could not agree with *J. Howarth* for such sale, or if *J. Howarth* should be dead, then upon trust to sell his share in the said mills, machinery, and other partnership property, either by public auction or private contract. And after giving various pecuniary and other legacies, the trustee devised and bequeathed the residue of his real and personal estate to the same trustees upon trust to sell and convert the same into money and invest the same as therein mentioned. And he directed that all the said trust moneys, stocks, funds, and securities, and all the money to be received under the trusts of his will, should form an aggregate fund, and be held upon trust, after paying his debts, funeral and testamentary expenses and legacies, to lay out and invest certain sums upon the charitable objects therein mentioned, and to pay and divide all the rest, residue, and remainder of the money remaining in the hands of the trustees under the trusts of his will equally between the *Wesleyan Missionary Society*, the *Decayed and Worn-out Ministers' Fund*, belonging to the *Wesleyan Conference*, and the *British and Foreign Bible Society*.

The testator died in September, 1869, and this action was brought by his daughters and co-heiresses against the trustees and executors for the administration of his estate. The principal question raised on the further consideration of the action was whether the gift of the residuary estate, so far as it consisted of the

testator's share in the *Upper* and *Lower Mills* and the machinery and fixtures therein, was void under the *Mortmain Act*.

The further consideration came on to be heard before Vice-Chancellor *Malins* on the 24th of June, 1878.

Higgins, Q.C., and *Bunting*, for the *Wesleyan Missionary Society*.

Romer, for the *British and Foreign Bible Society*.

Glasse, Q.C., and *Bird*, for the Plaintiffs.

Bristowe, Q.C., and *Byrne*, for one of the next of kin.

J. Pearson, Q.C., and *Woodroffe*, for others of the next of kin.

Kekewich, Q.C., *Ingle Joyce*, and *Method*, for other parties.

Rigby, for the Attorney-General.

MALINS, V.C.:—

I have recently expressed my opinion in the case of *Cooper* v. *Cooper* (which was before me on the 21st of May, 1878) that freehold property which had been employed by a testator in his business, and which formed part of his partnership assets, must be treated as personal estate, but that was as between the real and personal representatives. It is quite a different question whether the proceeds of the sale of real property can be applied for charitable purposes, and I must decide that any property derived from the sale of freehold estate is within the *Statute of Mortmain*, and cannot be applied for the benefit of the charities mentioned in the will.

From this decision the *Wesleyan Missionary Society* and the other charities appealed. The appeal came on to be heard on the 23rd of March, 1880.

Higgins, Q.C., and *Bunting*, for the *Wesleyan Missionary Society*:—

The testator's interest in the partnership property was pure personalty, and, as such, was capable of being bequeathed to

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charitable uses. The question turns on the real interest of a deceased partner in the partnership property. It is only a right to call for an account against the surviving partners, and no partner has a right to claim the property in specie: *Lindley* on Partnership (1); *Waterer* v. *Waterer* (2); *Phillips* v. *Phillips* (3); *Darby* v. *Darby* (4); *Houghton* v. *Houghton* (5); *Marsh* v. *Attorney-General* (6). It has been repeatedly held that shares and debentures in corporations and public companies are pure personalty, and there is no distinction in principle between shares in public companies and in ordinary partnerships. In neither case does the bequest come within the mischief struck at by the statute; for it is impossible that the charity should ever take the gift in the form of land: *Morris* v. *Glynn* (7); *Edwards* v. *Hall* (8); *Myers* v. *Perigall* (9); *Entwistle* v. *Davis* (10); *In re Mitchell's Estate* (11); *Holdsworth* v. *Davenport* (12); *Attree* v. *Hawe* (13); *Wild* v. *Milne* (14); *Raymond* v. *Lakeman* (15). The last-mentioned case is distinctly in point. It makes no difference whether the legal estate in the land is in a corporation or in individuals, or whether it is in the partners or in a trustee for them; in all cases the partner can exercise no ownership over it except in his capacity of partner, and his rights with respect to the land are the same whether he is a partner in a public company or a private firm.

Romer, for the *British and Foreign Bible Society*.

Glasse, Q.C., and *Byrne*, for the Plaintiffs.

J. Pearson, Q.C., and *Northmore Lawrence*, for some of the next of kin:—

It may be conceded that where land is vested in a corporation or in trustees for the benefit of a company upon trust to divide the profits only among the members, the members have no

(1) 4th Ed. vol. i. p. 672.
(2) Law Rep. 15 Eq. 402.
(3) 1 My. & K. 649.
(4) 3 Drew. 495.
(5) 11 Sim. 491.
(6) 2 J. & H. 61.
(7) 27 Beav. 218.
(8) 6 D. M. & G. 74.
(9) 2 D. M. & G. 599.
(10) Law Rep. 4 Eq. 272.
(11) 6 Ch. D. 655.
(12) 3 Ch. D. 185.
(13) 9 Ch. D. 337.
(14) 26 Beav. 504.
(15) 16 W. R. 67.

interest in anything beyond the profits; but it is different where land is vested in partners, or in trustees for an ordinary partnership. In that case the partners have an interest in the land. No doubt any partner has a right to have his share realized in the form of money; but until that is done he has an interest in the land itself. It is an interest of the same nature as a right to the proceeds of land held in trust for sale: *Hayter* v. *Tucker* (1); *Sparling* v. *Parker* (2); *Day* v. *Croft* (3); *Watson* v. *Spratley* (4); *Baxter* v. *Brown* (5); *Bligh* v. *Brent* (6); *Brook* v. *Badley* (7). In the case of corporations and public companies the partnership is a perpetual one, and the partners can withdraw at any time selling their share in the profits to the new members, and no one looks to realizing his rights by sale of the land. In an ordinary partnership like the present the outgoing or deceased partner looks to the land as a security for his share.

Method, for other next of kin, cited *Attorney-General* v. *Harley* (8); *Morris* v. *Glynn* (9); *Jeffries* v. *Alexander* (10).

Rigby, for the Attorney-General.

Kekewich, Q.C., and *Ingle Joyce*, for other parties.

Higgins, in reply.

JAMES, L.J.:—

I am of opinion that the decision of Vice-Chancellor *Malins* in this case ought to be affirmed. The case has been very fully, very elaborately, and I need not say very ably argued, and I think we have had everything suggested to us that could possibly be suggested in the case, and, with some fluctuation of opinion during the time of the argument, it appears to me at last that we must arrive at the conclusion that the case is hit by the words of the statute commonly called the *Statute of Mortmain*.

(1) 4 K. & J. 243. 4 Jur. N.S. 257
(2) 9 Beav. 450.
(3) Cited ibid. p. 455.
(4) 10 Ex. 222.
(5) 7 Man. & G. 198.
(6) 2 Y. & C. Ex. 268.
(7) Law Rep. 3 Ch. 672.
(8) 5 Madd. 321.
(9) 27 Beav. 218.
(10) 8 H. L. C. 594. 7 Jur. N.S. 221

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There are some expressions in the judgment which I prepared in the case which had been referred to, *Attree* v. *Hawe* (1), which seem to indicate that we thought the cases had gone to the extent of saying that no share in a partnership which had land for the purposes of the partnership, or real property, or impure personalty, as part of the assets or capital, was hit by the statute of Geo. 2; that expression was not really applicable to anything we then had before us to decide; it was expressed rather too generally, and I may say, speaking for myself, inadvertently. The attention of the Court was then called to the whole of the cases then decided, of which *Myers* v. *Perigall* (2) was the exemplar. It certainly had been decided in *Myers* v. *Perigall* and other cases of exactly the same character that shares in a joint stock company, whether incorporated or unincorporated, which has land either as the substratum of its business, or other real assets as part of the assets of the business, are to be dealt with for the purposes of the statute as pure personal estate, but that is because they are to be treated just as if they were shares in a corporation, and they have always been held to be unaffected by the statute. The great distinction between that class of cases and the case of a private partnership is this, that in all those cases the intent and meaning of the partners is that the partnership, whether it be large or small, is to be in the nature of a corporation, they are all of them intended to have perpetual existence, and they are all intended to exist with fluctuating bodies of members from time to time, just like a corporation. Then no partner is ever supposed to have anything to do with the land except as one of the society through the machinery provided by the Act or deed of settlement, and is never intended to have anything to do with the land in any shape or form except to get the profits from the land or the profits from the business of which the land is a part, and it is always intended that every share should pass in the market as a distinct thing, and in point of beneficial ownership wholly unconnected with the land or with the real assets of the partnership property of the company. That was the class of cases with respect to which the decision I have referred to was made. The principle which was established in *Myers* v. *Perigall* was applied by

(1) 9 Ch. D. 337. (2) 2 D. M. & G. 599.

this Court in the case of *Attree* v. *Hawe* (1) to what is called debenture stock in railroads.

Now the case of a private partnership stands upon a very different footing, not only practically but theoretically, in point of law and upon the ground which was pointed out by Lord *Cairns* in *Brook* v. *Badley* (2), to which we have been referred—but which does not seem to have been adverted to in some of the other cases—that, whether it is going beyond the preamble or not, one of the things which the statute in express terms hits at is anything which is a charge or incumbrance upon real estate. Those very words are in the statute, and were put in for the purpose of preventing those possible evasions, some instances of which I attempted to give in the judgment in *Attree* v. *Hawe*. There are the words "any charge or incumbrance." Now it appears to me that in a private partnership which has got land it is difficult to say that the partner has not an interest in land—not *quâ* partner, because I agree with what Mr. *Higgins* has said, that it does not signify in whom the legal estate is, in whom the ownership of the freehold is—that that may be either in all the partners or one or more of the partners, or it may be in a trustee wholly outside the partnership, and I agree that the beneficial interest is a beneficial interest in the partners not as tenants in common or as joint tenants, or anything of that kind, but their interest is exactly in proportion to what the ultimate amount coming due to them upon the final taking and adjustment of the accounts may be. Suppose the capital of the firm consisted of land, as it does in this case, and that this was made to appear in the books, as it ought to appear if the books were properly kept; and that the capital of the firm consisted of, say £60,000, or any large sum of the kind—there might be due to one partner so many thousand pounds, shillings, and pence, and there might be due to another partner so many thousand pounds, shillings, and pence, and from another there might be a sum due, and he would be obliged to contribute that sum to make up the proper amount of capital. Therefore the share of each of the other partners no doubt is not a share in any specific asset or any specific part of the assets real or personal, but is his share of what will ultimately come to him

(1) 9 Ch. D. 337. (2) Law Rep. 3 Ch. 672.

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when the accounts are ascertained, and when the partners who are to contribute have contributed, and when the assets are got in, the debts paid, and the amounts realized. But then, although there be the right of each partner in so much capital stock, which is personalty, and I should say in one sense is pure personalty, because it is personalty as between the real and personal estate, still it is exactly that which comes within the very words of the statute. Whatever is the amount coming due to that partner, that partner has an immediate and direct charge or incumbrance on the land for that very sum, and his right is to have the land sold for the purpose of realizing that charge or incumbrance which he has upon it. I may give an illustration. Suppose, instead of its being a thing to be taken on settling the accounts, the partnership deed provided this and nothing more, that upon the death of a partner the surviving partners should take the whole of the assets, real and personal, and that the deceased partne should only be entitled to the share standing to his credit at the last taking of the accounts, with some proportion of the interest in the meantime, which is a very common clause, that would give a clear charge or incumbrance, unless it was expressly excluded by the terms of the deed, upon all the assets for the purpose of paying the sum due to him. Then a devise or bequest of the money so coming to him as his share of the partnership would be a devise of a sum of money directly charged on all the assets, real and personal, of the partnership. It appears to me that that circumstance does make a broad distinction between this case and the case of shares in joint stock companies, which alone have been the subject of decision in the Courts, as far as they are found in the reports. There is a case of a private partnership which is not reported anywhere, but which is referred to more than once by more than one learned Judge, as having been distinctly and clearly decided in accordance with the view now expressed by the Vice-Chancellor, and which we propose to affirm.

It is not necessary to go into any further detail as regards this point. Upon the simple ground that if not an interest in land it is at all events a direct charge on land, I think the order of the Vice-Chancellor ought to be affirmed. The costs must come out of the estate.

BRETT, L.J. :—

I am of the same opinion. I cannot but marvel at the great extent to which the construction of this *Mortmain Act* has been carried. It seems to me to have been carried much further than the reason of its enactment suggested or authorized, but the construction has been carried to this great length by authorities which are binding upon us, and which we have no right to dispute. Now, the authorities seem to me to have gone to this length, that although the devise to a charity is in terms of money only, and although the only thing which by the devise will come to that charity is money, yet if in order to effectuate the devise in favour of that charity it may be necessary to deal with an interest in land of the testator—the devise is within the *Statute of Mortmain*. It appears to me that the construction of that statute has been carried as far as that, and that the case of *Brook* v. *Badley* (1), before Lord *Cairns*, cannot be supported, and cannot be faithfully followed unless it is a decision to the full effect of that proposition. The decision in *Brook* v. *Badley* seems to me virtually, and indeed intentionally, to overrule the case of *Marsh* v. *Attorney-General* (2), and the case of *Brook* v. *Badley* is one we are bound to follow.

That being the large interpretation which has been placed upon the statute, there have been certain cases decided in which it has been said that that principle does not apply. The first set o cases are those of corporations, in which the corporation has an interest in land, but where it has been held that although the corporation has an interest in land, yet the shareholders in that corporation have not such an interest, and that a devise of their shares is not within the *Mortmain Act*. It seems to me obvious that in that case the whole value of the share can be realized without interfering with the land at all, the land will remain untouched in the hands of the corporation, the whole interest of the shareholder, the devisor, will be realized without interfering with the land at all, or with any interest in land, and the money which will go to the charity will be mere money.

Then there comes the case of companies which are constituted by statutes, but they are the same as corporations in some respects, and we need not deal with them.

(1) Law Rep. 3 Ch. 672. (2) 2 J. & H. 61.

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We then come to the case of what have been called joint stock companies, which it has been argued are precisely the same as ordinary partnerships. With great deference there is a distinction. There are joint stock companies where by the agreement of the partners, that is to say, by the constitution of the company to which they have agreed, there are to be shares in the company, and there are to be shareholders, and by the agreed constitution of the company those shares may be transferred, and the company still continued. Now, in such a case if the company is the owner of land, in one sense, it may be said that that land does not belong to a corporation but does belong to the shareholder; but by the agreement of the parties that matter is to be dealt with precisely as if there was a corporation, that is to say, the shares are to be allowed to be transferred, so that the new shareholders may come into the partnership without the partnership ceasing at all, and so far as the constitution of the company and the intention of the parties are concerned, the whole value of the shares, that is, the whole interest of the shareholders, may be transferred for money, the partnership continuing and the partnership property continuing untouched by the intention of the parties. The matter is thus exactly the same as in the case of a corporation.

Now, whether anybody may cavil at the decision of *Myers* v. *Perigall* (1) or not is not to the purpose. *Myers* v. *Perigall* is an authority which cannot be overruled, and *Myers* v. *Perigall*, dealing with such a company so constituted, said that with regard to the *Mortmain Act* it was just the same as if there were a corporation and shareholders. Therefore in such a case, although the company is not a corporation, although it is not a company within any statutes, yet, inasmuch as by agreement of the parties to the constitution of the company the shares are intended to pass without interfering with the land that may belong to the company, it has been held that a devise of shares in a company so constituted is not a devise to a charity obnoxious to the *Mortmain Act*.

But when you come to the case of an ordinary partnership not so constituted, which holds land, one partner cannot dispose of his interest without the consent of the others, and supposing he dies, the partnership is at an end, and it may not be possible to ascertain

(1) 2 D. M. & G. 599.

his interest in the partnership without dealing with the land which is the property of the partnership, in which, therefore, he has an interest. It comes within the proposition laid down by the cases, that where it may be necessary to deal with the land in order to effectuate the devise in favour of the charity the gift is void. Therefore it seems to me the case of an ordinary partnership is not within the exceptional rules, but within the original rules, and therefore this decision was correct.

COTTON, L.J.:—

I am also of opinion that the decision of the Vice-Chancellor must be affirmed. The question which we have to consider is this, whether the interest of the testator in certain land used by him and his partner, during his lifetime, for the purposes of the partnership could legally be given to a charity, notwithstanding the Act of the 9 Geo. 2. It is probably unnecessary to mention, but I do so from what was urged in the course of the argument, that it is not in any way a question as to whether it is personal estate or real estate. There are a number of things admittedly personal estate, which, notwithstanding that fact, cannot legally be given to charity in consequence of the Act of the 9 Geo. 2. As that is so, one may put aside all the argument on those cases which have decided that the interest of a partner in a partnership though there is land, and his interest in the partnership property consisting of land, are personal estate, and go to his next of kin, and not to his heir-at-law.

The question is, not what the charity can take under this will, but what was the interest of the testator in the property which he attempted to devise to that charity? I mention that because there was a good deal of argument to this effect:—How can this be within the mischief of the statute when it was perfectly impossible that under this devise the charity could ever take any land? That is not the question, because what the Act points at is the devise of land—that is, it prevents testators giving by their wills that which in them is land or an interest in land, and what we have to consider really is, whether or no the interest of the testator was land or "any estate or interest in land, or any charge or incumbrance thereon."

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Now, to deal with it first of all without reference to any of the cases on the point, we must consider whether this is not an interest or charge on land. If a charge, then it was an interest. No doubt it was a mere partnership at will, and at the time when the testator died this will became operative, and there was an end of the partnership. The only way in which, except by arrangement, his estate or those who claimed through him could get his share in the partnership, was by paying all the debts, winding-up the partnership, and selling the real estate and the other property belonging to the partnership, giving to him the balance of the proceeds after all claims were settled, or rather his share of the balance of the proceeds after all claims were satisfied; because undoubtedly in the disposition any one partner can, although all the debts are paid, if he thinks his interest so requires, say that the real estate shall be sold, and not be divided amongst the parties, and obviously in many cases it must be so, that there cannot be a division, and there must be a sale. At all events it is the right of the surviving partner, if he desires it, to say there shall be a sale, and, therefore, I say that the testator could not get his interest in this partnership or in this land except either by special arrangement or by sale. Then when there was a sale he would have a right to the proceeds of the sale of the land, and to have that paid to him, and until there was a sale he would have a claim against the land and as against also the other assets of the partnership, whether you call it lien or charge, or anything else, to secure to him what was ultimately coming to him. It is, in my opinion, independently of any decision, an interest in land, and we cannot but say that a gift of his interest in the partnership property being land is a gift of an interest in land within the 3rd section of the *Statute of Mortmain*. If authority be required to assist us in arriving at that conclusion, in my opinion the principle of *Brook* v. *Badley* (1), before Lord *Cairns* when Lord Chancellor, by which of course we are bound, does decide that under such circumstances, although what the testator could get is money only, and although he leaves an interest which he can only get in the shape of money, still it is an interest in land, if at the time of his death what he devises is in the shape, not

(1) Law Rep. 3 Ch. 672.

of money realized, but of money which is to be produced by the sale of land, he having an interest or charge upon the land till that money is realized, and in a state to be paid to him as money. I think the decision on principle and on that authority is right.

But still in such a case as this, when perhaps all the cases are not very clearly reconcilable with one another, one must consider what cases there are in support of the contention of the Appellants. It is unnecessary to go through them all, because they can be easily summarised. *Myers* v. *Perigall* (1) is the principal decision upon which the Appellants rely, and I will presently deal with the question as to how far that applies to the present question; but independently of that decision there was little on which they could rely, with the exception of *Raymond* v. *Lakeman* (2), which never came into the regular reports, and *Marsh* v. *Attorney-General* (3). No doubt *Marsh* v. *Attorney-General* does seem to support the argument that as the testator could get nothing but money, although that money was to be produced by a sale of real estate, yet he could leave his interest such as it was to charity. But if that was the principle on which *Marsh* v. *Attorney-General* was decided, it was clearly inconsistent not only with the principle of the decision, but with the decision itself, of the Lord Chancellor in *Brook* v. *Badley* (4), and of course we are bound by that decision of the Lord Chancellor, even although we did not think it right, which in my opinion it is.

I next come to the question, whether *Myers* v. *Perigall* does or does not apply. That was a decision with reference to an unincorporated joint stock company. The distinction between corporation and unincorporation is, in my opinion, entirely immaterial; but that applies to a company the principle of which was this, that it should have a continuing existence notwithstanding the changes in the persons who constituted the partnership, that is to say, in that, as in other joint stock companies not incorporated, there is an attempt to give—and a successful attempt to give—a *quasi*-corporate character to the body called in ordinary language the company to distinguish it from partnership. Whether the partners die, or whether they transfer their shares to others,

(1) 2 D. M. & G. 599. 17 Jur 145.
(2) 16 W. R. 67.
(3) 2 J. & H. 61. 7 Jur NS 184.
(4) Law Rep. 3 Ch. 672.

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which they are ordinarily at liberty to do without any prohibition or restraint, the body or the company is to continue; the business is to be carried on under a partnership for the benefit of those who for the time being may be in union, either by originally taking shares or by taking a transfer of shares. As a consequence the shares can be realized not only by winding up the whole concern but by selling them in the market; and there is also another distinction, not so material, but material perhaps with reference to some observations of Judges in different cases, that in these joint stock company cases, whether corporate or unincorporate, the shareholders as such have no right of interference whatever with the property; they cannot go, as was said by Lord *St. Leonards*, upon the partnership land. The management and the right of going on the partnership property is solely and exclusively in the managers or the directors.

Then how does the decision that the gift of a share in such a company as that in *Myers* v. *Perigall* (1) is not within the Act of Geo. 2 apply to such a case as this? There is the great distinction that the shares in that case from the constitution of the company were capable of being realized without winding up the concern, and therefore what the charity took was a share which it could sell in the market or might hold without any objection as to its being an interest in land, whereas, in the present case, the interest of the testator in this partnership property could only be realized by requiring the assets to be realized, that is, that this particular asset should be sold and a portion of the proceeds of sale paid to him. That involves, for the purpose of realizing that which he gives to the charity, the necessity of dealing with land, and gives him, for the purposes of so dealing as to realize his interest, an interest or charge upon the land. In my opinion, therefore, there is a substantial distinction between this case and the case of *Myers* v. *Perigall*, which enables us to say that it is not a decision applying to or governing this case, and that the case ought to be dealt with and decided independently of that decision, on the other authorities and on principle.

I must say with regard to *Brook* v. *Badley* (2), that it is impossible to hold, as argued by Mr. *Higgins*, that partnership property

(1) 2 D. M. & G. 599. 17 Jur. 145 (2) Law Rep. 3 Ch. 672.

is put in an entirely different category, and that, therefore, the principle of Lord *Cairns'* decision in *Brook* v. *Badley* (1), though apparently applying to cases where the interest of the testator in money is to be realized by sale of real estate, does not apply to the case of a partnership. In my opinion, there is no such distinction on principle or authority between partnership property and other property as to justify us in saying that the principle of *Brook* v. *Badley* does not apply to a share in a partnership.

JAMES, L.J.:—

With regard to one thing that Lord Justice *Cotton* has mentioned, I may say I do not consider the decision of a Lord Chancellor is absolutely binding upon us, because every Lord Chancellor's decision was liable to be reheard not only by himself but by his successor, and there are instances known of it. When I was sitting with Lord Justice *Mellish* we did rehear decisions of the Lord Chancellor *Selborne*. There is always this to be considered, that it is the decision, no doubt, of a superior Court of Appeal; but it is always qualified by this, that according to the old practice of the Court of Chancery it was liable to be reheard.

I meant to have added by way of addition to the illustration I gave, that if the share of a partner in partnership assets could be well given to a charity, it would govern the case of a partner who by reason of the insolvency of his partners was really and substantially the sole owner of the partnership assets, including the freeholds.

Solicitors: *Clarke, Woodcock, & Ryland; Walker & Battiscombe; Hollams, Son, & Coward; Robinson & Preston; Gregory, Rowcliffes, & Rawle; Hare & Fell.*

(1) Law Rep. 3 Ch. 672.

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[1875 T. 114, 115.]

Public Health Act, 1848 (11 & 12 *Vict. c.* 63), *ss.* 69, 129—*Local Government Act*, 1858 (21 & 22 *Vict. c.* 98), *s.* 62—*Local Government Amendment Act*, 1861 (24 & 25 *Vict. c.* 61), *ss.* 23, 24—*Expense of Sewering and Paving—Private Improvement Expenses — Election of Remedy — Charge upon Land — Summary Proceedings—Limitation to Six Months.*

A local board, in the year 1864, determined to do certain works in a street adjoining the Defendant's house, for the expenses of which the Defendant, among others, was made liable under sect. 69 of the *Public Health Act*, 1848, and for which, consequently, there was a charge on the property under the 62nd section of the *Local Government Act*, 1858. Before the works were done they resolved that the expenses were private improvement expenses under the 90th section of the *Public Health Act*, 1848, and should be recovered from the owners and occupiers by annual instalments. In 1872 they revoked the resolution, and made a fresh rate for the whole amount then remaining unpaid to be paid by the owners and occupiers. This rate being unpaid in 1875, they brought an action against the Defendant to enforce the charge on his land under the 62nd section of the Act of 1858 :—

Held (reversing the decision of *Malins*, V.C.), first, that the limitation of six months, within which summary proceedings must be taken before the justices or in the County Court under the *Local Government Act*, 1861, does not apply to the enforcing of the charge created by the 62nd section of the *Local Government Act*, 1858. Secondly, that the election of the board to declare the expenses to be private improvement expenses did not prevent them from enforcing the charge on the land, but that they could only enforce it in respect of the instalments that were for the time being in arrear.

THIS was an action by the *Tottenham Local Board* against the executors of *M. Rowell*, who died in the year 1874, to enforce a charge upon the property of the deceased for a sum of £25 and interest from February, 1873, being the amount of a rate levied upon the inhabitants of the district by the board under the powers of the Local Government Acts.

On the 25th of October, 1864, the Plaintiffs served a notice upon the owners and occupiers of several streets in the district to sewer, level, channel, and repair the same. Amongst the notices they served one upon *M. Rowell*, who was at that time the owner of certain premises fronting and abutting on a street called

Nightingale Road, in the parish of *Tottenham*, which was one of the streets requiring repair.

None of the owners or occupiers upon whom notices were served complied with their notices, and the Plaintiffs in the years 1864 and 1865 executed the works themselves, as they were empowered to do under the *Public Health Act*, 1848 (11 & 12 Vict. c. 63), s. 69, and in pursuance of the same Act the expenses occasioned by such repairs were assessed by the Plaintiffs' surveyor and apportioned among the owners.

On the 8th of July, 1864, the Plaintiffs passed a resolution that the expenses of the board in the execution of the works were private improvement expenses, and should be payable by the owners and occupiers by annual instalments, with interest at £5 per cent. for twenty years, under the 90th section of the *Public Health Act*, 1848, and the 23rd section of the *Local Government Act*, 1861. In accordance with this resolution, on the 13th of July the Plaintiffs made a Private Improvement Rate for raising the money.

Some of the instalments of this rate were paid, but in 1867 the validity of the rate was disputed before the magistrates.

On the 8th of August, 1868, the Plaintiffs made an order that the expenses which had been declared to be Private Improvement Expenses remaining unpaid should be paid by the occupiers in annual instalments for fourteen years.

On the 17th of December, 1872, the Plaintiffs revoked the resolution declaring the expenses to be private improvement expenses and the orders consequent thereon, and they ordered a fresh apportionment to be made and to be paid by the owners and occupiers.

A notice of the fresh apportionment was duly served upon *M. Rowell* on the 18th of February, 1873, stating the amount payable by him, and informing him that unless within the expiration of three months from the service of the notice he should dispute the apportionment it would be conclusive upon him.

This action was originally commenced by plaint in the County Court on the 8th of June, 1875, but was transferred to this Division of the Court on the 25th of June, 1875.

The action came on for trial before Vice-Chancellor *Malins* on the 14th of January, 1880.

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Higgins, Q.C., and *Ilbert*, for the Plaintiffs:—

The question is, whether the Plaintiffs have a right to a charge in respect of the rates upon the property of the owner at the time of service of the notice to pay, after the expiration of the six months to which summary proceedings for recovery of the amount are limited.

By the *Public Health Act* of 1848 (11 & 12 Vict. c. 63, s. 69) the Plaintiffs had power to require owners of property abutting upon streets which were out of repair to make the necessary repairs, or in case of default to do the work themselves, and to direct their surveyor to assess the expenses incurred thereby, and such expenses, when apportioned between the ratepayers, were to be recovered in the summary way indicated by the 129th section, which was to be before two justices, and power of distress was given in case of non-payment. Then by the *Local Government Act* of 1861 (24 & 25 Vict. c. 61, s. 24) there is the same summary mode of obtaining payment by an application to the County Court where the debt is under £20.

But the Act under which we now sue is the *Local Government Act* of 1858 (21 & 22 Vict. c. 98), and by sect. 62 of that Act it is provided that where the Local Board have incurred expenses for the repayment of which the owner of the premises in respect of which the same are incurred is made liable under the *Public Health Act* of 1848, the same may be recovered from the person who is owner of such premises when the works are completed in the manner provided by the Act of 1848, and such expenses shall be a charge on the premises in respect of which they were incurred, and shall bear interest at the rate of £5 per cent. per annum till payment thereof. Under this section we claim to have it declared that the expenses incurred by the board, and which have been apportioned among the ratepayers, are a charge upon the premises in respect of which the expenses were incurred. Under this Act there is no time limited within which such charge is to be declared, and there is no reason why any time within twenty years should be a bar to the allowance of the claim. When the demand is first made it is a personal debt to be paid by the owner or occupier, and a period of six months is fixed as the limit within which the summary proceedings are to be taken

before the magistrates or in the County Court, but in default of payment then the debt is to become a charge upon the property of the owner. The reason of this enlarged power is obvious: because the "occupier" of any property may be here to-day and gone to-morrow, and there may be great difficulty in finding him, but if he does not pay, then the "owner" at the time the rate is levied is to be liable, and the debt is to be a charge upon his property. The owner may be traced after the expiration of six months, and the Local Board is not to lose the apportioned rate because the occupier cannot be discovered or refuses to pay the debt.

Then, on the subject of delay, which will be brought against us. We shew that there was in effect no delay. After the assessment was first made objections of form were taken, and it was not until after the decision in *Cook* v. *Ipswich Local Board of Health* (1), that we were able to make a valid assessment and apportionment of the expenses. This was completed in 1873. Objections were again raised by various ratepayers, and in 1874 there were as many as twelve test cases prepared which it was hoped would obviate further refusals to pay. Those cases being under £20 were heard before the County Court, and they were all decided in favour of the Local Board. Then there was a special case prepared, but that was given up. Still many of the ratepayers stood out and refused to pay. After that came a case in which the board sued the present Defendant in the County Court, and an appeal was heard on the 10th of February by the Divisional Court, and that decision was appealed again to the full Court of Appeal, and is reported, *Tottenham Local Board of Health* v. *Rowell* (2). These different proceedings rendered it necessary to stay the proceedings in this action pending the settlement of the questions raised in the other proceedings, but since then there has been no unnecessary delay on the part of the Plaintiffs. We now contend that we have two distinct remedies, one against the person and the goods of the owner or occupier of the premises, and the other a remedy against the property of the owner, and that the second remedy is not limited to any precise time as the first remedy is, and that we are now entitled to the charge we claim.

(1) Law Rep. 6 Q. B. 451. (2) 1 Ex. D. 514.

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There are two authorities in our favour, one is the *Vestry of Bermondsey* v. *Ramsey* (1), where a judgment recovered by the Vestry of *Bermondsey* against a former owner of certain premises in respect of which a charge for expenses of a similar nature to these had been made, remained unsatisfied, and it was held that such judgment was no bar to a subsequent action for the same expenses against the defendant, who occupied the premises as tenant to a succeeding owner. The other is the *Plumstead Board of Works* v. *Ingoldby* (2). In that case assessments for paving expenses apportioned by the vestry or district board were held to be a charge upon the premises in respect of which they were assessed, and the amount was held to be recoverable from the future owners of such premises.

J. Pearson, Q.C., and *Hunter*, for the Defendants, were not called upon.

MALINS, V.C.:—

My views in this case are very clear. They may be very wrong, but they are perfectly clear to my mind. This is a plaint filed in the County Court, and commenced, as I understand, on the 8th of June, 1875, for the recovery of a sum of money by the *Tottenham* Local Board, which they contend that they are entitled to recover under these circumstances. By the 69th section of the *Public Health Act*, 1848, it is provided that in case any present or future street (not being a highway) be not sewered, levelled, paved, flagged, and channelled to the satisfaction of the Local Board of Health, such board may, by notice in writing to the respective owners or occupiers of the premises abutting upon such streets, require them to sewer, level, pave, flag, or channel the same within a time to be specified in such notice; and if the notice be not complied with, the board may, if they think fit, execute the works themselves, and the expenses incurred in so doing shall be paid by the owners in default, in such proportion as shall be settled by the surveyor; and such expenses may be recovered from such owners in a summary manner, or the same may be declared by

(1) Law Rep. 6 C. P. 247. (2) Law Rep. 8 Ex. 63.

the board to be private improvement expenses, and be recoverable as such in manner thereinafter provided.

Then the Act, having described the improvements the owner is to make if required, and having on his default given the Local Board power to make them, provides the remedies for recovering the expenses so incurred, and these are given by the 90th and 129th sections. I think the 90th section has not much to do with it; the important section is the 129th, which is, "That in all cases in which the amount of any damages, costs, or expenses is by this Act directed to be ascertained or recovered in a summary manner, the same may be ascertained by and recovered before two justices, together with such costs of the proceedings as the justices may think proper; and if the sums adjudged be not paid by the party against whom the adjudication is made, the same may be levied by distress and sale of his goods and chattels by warrant under the hands and seals of the justices making the adjudication."

There it prescribes the mode in which the thing is to be done. Therefore the Plaintiffs are to be paid by the owners if required; there is an assessment to be made, and if it is not paid, it is to be recovered by distress or summary proceeding before two justices. Then this is considerably extended by the *Public Health Act* of 1858 (the 21 & 22 Vict. c. 98); and by sect. 62 of that Act it is enacted—and this is mainly relied on by the Plaintiffs—"Where the Local Board have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable either by application of or agreement with the owner, or by the *Public Health Act*, 1848, or any Act incorporated therewith, or this Act, the same may be recovered from the person who is owner of such premises when the works are completed for which such expenses have been incurred, in the manner provided by the *Public Health Act*, 1848, and such expenses shall be a charge on the premises in respect of which they were incurred, and shall bear interest at the rate of £5 per cent. per annum till payment thereof. In all summary proceedings by a Local Board for the recovery of expenses incurred by them in works of private improvement, the time within which such proceedings may be taken, shall be reckoned from the date of the service of notice of demand."

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That is entirely a new charge, and it is contended that that is a power of getting a charge on property which may be exercised by the Local Board at any time within which, according to the rules of this Court, an action may be maintained for making a charge on land, that is, within twenty years. Then by the 24th section of the *Local Government Act*, 1861 (24 & 25 Vict. c. 61), it is provided, "that proceedings for the recovery of demands below £20, which Local Boards are now empowered by law to recover in a summary manner, may, at the option of the Local Board, be taken in the County Court as if such demands were debts within the cognizance of such Courts."

This litigation has arisen in this manner: It is contended that there is no laches—that the Local Board are perfectly right, that they are not too late, and that they ought now to have an order declaring a charge on *Rowell's* property. The improvements were made in 1864–5, and were completed in 1865, and according to the provisions of the Act a surveyor proceeded to make assessments of what every owner ought to pay. That was ineffectually done, and therefore, according to the decision in *Cook* v. *Ipswich Local Board of Health* (1), the first assessment being ineffectual, the surveyor was not *functus officio*, but was at liberty to make a new assessment. Accordingly a new assessment was made effectually. There is no dispute that that was made in 1873. Now the assessment being made, the Local Board are bound to give notice to the owners requiring it to be paid, and if the person assessed does not pay, they have the remedies given by the various Acts. They have a right, therefore, to take the defaulter before two justices, and if payment is not made they have a right of distress; or, instead of going before the justices, if the amount is under £20 they have a right to go into the County Court. That right has since been extended to demands below £50 by the *Public Health Act*, 1875 (38 & 39 Vict. c. 55, s. 261). I should have mentioned that by *Sir J. Jervis's Act* (11 & 12 Vict. c. 43, s. 11), all summary proceedings before justices were to take place within six months; that is, the *Statute of Limitations* pleaded.

On this point there is the decision in the case of *Tottenham Local Board of Health* v. *Rowell* (2), which was brought by the

(1) Law Rep. 6 Q. B. 451. (2) 1 Ex. D. 514.

same Plaintiff against this same individual. There, the sum being under £20, the plaint was brought against this Defendant in the County Court, and it was argued that although proceedings before the justices were limited to six months, proceedings in the County Court were not. The County Court Judge decided in favour of the Local Board. That was taken by appeal to the Divisional Court, consisting of Baron *Cleasby* and Mr. Justice *Field*, who gave judgment for the Defendant, on the ground that, the claim of the Plaintiffs having accrued more than six months before the commencement of the action, the case of *West Ham Local Board* v. *Maddams* (1) was an authority for holding the action not to be maintainable.

The Local Board attach great importance to this case, and no doubt it is a matter of very great importance to owners of property in parishes generally, whether at the option of a Local Board they are to have these claims hanging over their heads for twenty years, because the Local Board does not choose to be vigilant and take the necessary proceedings for recovering the money against a man who is able to pay—I will not say who is willing to pay, but who can pay and may be made to pay. No doubt in this case *Rowell* has sufficiently shewn his unwillingness to pay, but he was, at all events, able to pay, and had goods enough to be distrained upon, and he would no doubt have paid if he had been legally required to do so. That case of *Tottenham Local Board* v. *Rowell* (2) was then taken to the Court of Appeal, consisting of Lords Justices *James*, *Mellish*, and *Baggallay*, and Justice *Quain*, and the decision is, that inasmuch as the Board were limited to six months if they went before the justices, they were equally limited to the same period when they went before the substituted tribunal—the County Court. Lord Justice *James* says: "I am of opinion that the decision of the Court below ought to be affirmed. The point argued was considered and decided in the Queen's Bench Division in *West Ham Local Board* v. *Maddams*. It was there determined that the limitation of six months applied to proceedings in the County Court as well as to proceedings before justices, and in my opinion the decision was right;" and Lord Justice *Mellish* says: "It is quite impossible to suppose that the intention of the Legislature

(1) 1 Ex. D. 516, n. (2) 1 Ex. D. 514.

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was that claims under £20 should be recoverable after the lapse of six months by suing in the County Court, while amounts above £20, being recoverable only before justices, can be proceeded for only within that time."

Now I have pointed out that the liability to pay this money was incurred in 1865 at the latest. No effectual assessment was made of the amount to be paid by *Rowell* till 1873. No proceedings of any description that I have been able to find out were taken against him before June, 1875. What excuse is offered for that delay? They were bound to know the Act which gives them these remedies by proceedings before the justices and by distress —not by the County Court, in this case, because the amount was £25, and therefore excluded from the operation of the Act of 1861 (23 & 24 Vict. c. 61, s. 24). They knew, therefore, that they had the remedy before the justices and the remedy by distress upon non-payment. What excuse is offered for delaying for two years? This is a proceeding against the legal representatives of *Rowell*, who died in 1874; but while they are armed with these powers of proceeding and recovering this money without any difficulty whatever by summary proceedings, there being no suggestion that there was not abundant property to answer the distress, what excuse is there for delaying any proceedings whatever until the month of June, 1875? Then they try their hand thus: instead of going before the justices they go before the County Court, and overlook the provision manifest in any common sense view of the case as established by the decision to which I have referred—that inasmuch as this was only a substituted remedy, the same limitation of time which applied to the original jurisdiction must equally apply to the substituted jurisdiction; and they take the Defendant before the Court of Appeal, and no doubt put him to great expense, and their appeal was dismissed with costs, and they have had all the expenses to pay.

That having been decided against them upon the plaint of June, 1875, this plaint, which, I understand, is a different one from that on which the former decision went, is filed in the County Court on the same day, the 8th of June, 1875, and it was transferred to this branch of the Court by an order dated the 25th of June, 1875.

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What, then, is the plaint before me? It is that the Local Board may have a charge on *Rowell's* property. Being so transferred to me in June, 1875, it is not set down for hearing till the 1st of April, 1879, that is, a period close upon four years. What excuse is there for that delay? Now it is brought to a hearing. I do not attribute any laches to them after the 1st of April, because, when they set the case down for hearing, they did all they could, and the subsequent delay has arisen from accident and from the state of the business of the Court; therefore the delay on their part is up to the 1st of April, 1879. Under these circumstances it is contended that although they have lost the remedy undoubtedly by summary proceedings before the justices—although it has been decided against them that they could not maintain their plaint in the County Court—although they are without any remedy whatever except the charge on the land, this action is brought to a hearing in order that they may establish a charge on the land of *Rowell* for a sum of £25 which they might have recovered in 1873, at any time after the date on which the assessment was made, namely, the 31st of January. At any time within six months from that day they might have recovered by summary proceedings before the justices and by distress. What ground can there be for that delay? Why should a man be subject to have his land charged with a sum of money which ought to be recovered against him personally? The owner is now dead. Why should his estate be charged? because it is said there may be a charge on the land after all these delays attributable simply to want of viligance on the part of the Local Board.

Now what is the meaning of the Act? I have to put a construction upon it. Of course I assume it will be the subject of appeal, being a matter of great importance, affecting a great number of cases. I must come to the best conclusion I can. What is the meaning of the 62nd section of the Act of 1858 which creates the charge on the land? Does it mean that the Local Board may forego all the other remedies, lie by and do nothing, and not take a man before the justices, but simply wait for twenty years wanting one day, and then, because the Act says there shall be a charge on the land, bring him before a Court of Equity—a very expensive proceeding, first to get the charge on

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his land, and then, having got the charge, to take further steps to have the land sold to raise the charge? That would, in my opinion, be a most unreasonable interpretation of the Act, and I therefore read the charge on the land as meaning this, that when neither by summary proceedings nor by distress can they obtain the money, then and then only there may be a charge on the land. The charge on the land is subsidiary, but it never can, in my opinion, be made a primary mode of recovering the rate. But Mr. *Higgins* said there would be grievous hardship on the Local Board if this were the interpretation, because there may be a great difficulty in finding out who is the owner, and six months may elapse before they could do so. I do not believe there is any difficulty of the kind, or if there be, it would occur so seldom that it is not worth consideration. How can there be a difficulty? It is a matter of notoriety and public arrangement. You know who the occupier of the land is, and you can very readily find out from the public books who the owner is, and therefore, whether he be the occupier or the owner, there is no difficulty in finding him out. At all events, if you intend to maintain your rights of recovering the rates against any individual, you must take proceedings, in my opinion, within the time limited by *Jervis's Act*, that is, six months. Therefore this is my interpretation of the Act, that as the Court of Appeal has decided that six months was the limit within which they could sue for the debt in the County Court, so, in my opinion, for the reasons I have stated, they must take these proceedings within six months, and it is only on failure to recover the money by the other remedies that are provided, that they have a right to resort to the land. It is entirely attributable to their own negligence that they have not recovered the money in the proper time by summary proceedings, and the filing of this plaint being wholly unjustifiable, I dismiss it with costs.

C. A.

From this decision the Plaintiffs appealed. The appeal came on to be heard on the 16th of July, 1880.

Higgins, Q.C., and *Ilbert*, for the Appellants:—

The 62nd section of the Act of 1858 is that on which our claim is based. It provides a distinct and independent remedy in addi-

tion to that provided by the Act of 1848. It makes the expenses incurred a charge upon the premises, with interest at £5 per cent.; and nothing that has been done, and no resolution that has been passed as to the mode of assessing the money, and no delay that has occurred, has removed this charge. We do not seek to charge any one personally, but only the property. It makes no difference whether the expenses were declared to be private improvement expenses or not. It is not necessary to take any special proceedings for the purpose of establishing this charge; and if it were, it could not have been intended that this charge should be enforced within six months. It would not be possible to take summary proceedings, and after failing in them to enforce the charge on the property, all within six months. The limitation of six months only applies to the summary proceedings: there is no limitation as to enforcing the charge. The two remedies are quite distinct; they are against different persons and in different Courts.

[They referred to *West* v. *Downman* (1); *West Ham Local Board* v. *Maddams* (2); and to the 11 & 12 Vict. c. 63, ss. 69, 90, 129; 21 & 22 Vict. c. 98, s. 62; 24 & 25 Vict. c. 61, ss. 23, 24.]

J. Pearson, Q.C., and *Manby*, for the Defendant:—

The limitation of time applies to the remedy by enforcing the charge as well as to the summary remedies. That is the effect of the decision in *Tottenham Local Board of Health* v. *Rowell* (3). But in this case we have an additional defence. The Board having elected to treat the expenses as private improvement expenses, under sect. 90 of the *Public Health Act*, 1848, are bound by their election, and cannot now revoke their election and proceed under the clauses which apply to expenses which are not private improvement expenses. The time for them to exercise their option was when the works were done, and they did exercise it, and gave notice to the owners that they were private improvement expenses, and would be recovered by annual instalments from the occupier. This was a *quasi* contract, and the Defendant, trusting to it, allowed them to do the works. He has never objected to the expenses being paid in this way; but he objects to the Board revoking their

(1) 14 Ch. D. 111. (2) 1 Ex. D. 516, n.
(3) 1 Ex. D. 514.

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election and recovering the whole sum from the owner at once instead of by instalments from the occupier. *Wilson* v. *Corporation of Bolton* (1) was the converse of this case and governs it in principle. If the first assessment was invalid, the Board ought to have made a new apportionment under the original resolution: *Cook* v. *Ipswich Local Board of Health* (2), and *Hesketh* v. *Atherton Local Board* (3). The resolution declaring the expenses private improvement expenses operated as a release of the charge.

Higgins, in reply:—

It is no hardship on the owner to enforce the charge. The property has been improved by the works that have been done, and the Act of 1848 made the owner as well as the occupier liable for the expenses. The owner has always remained chargeable; but the 90th section of the Act of 1848 gave the additional power of recovering the amount from the occupier by instalments. There is nothing unreasonable in our delaying to enforce the charge. Every purchaser of a house ought to inquire if there is such a charge, as he inquires as to other incumbrances. We have a right to enforce all our remedies independently: *Vestry of Bermondsey* v. *Ramsey* (4). We do not now claim to enforce payment of the whole amount of the expenses, but only of the instalments that are in arrear.

JAMES, L.J.:—

It appears to me that this case may be disposed of on the one short point with which Mr. *Higgins* commenced, and with which he concluded his argument, that is to say, that the expenses are made a charge on the premises in respect of which they were incurred, bearing interest at the rate of £5 per cent. per annum until payment thereof. There is a distinct statutory charge in respect of those expenses, and it is not an unreasonable thing, because the property is improved. The works were done for the benefit of the property, fitting the property for building, and the like, and therefore it is not at all unreasonable or surprising to find it declared in an Act of Parliament in default of other

(1) Law Rep. 7 Q. B. 105.
(2) Ibid. 6 Q. B. 451.
(3) Law Rep. 9 Q. B. 4.
(4) Ibid. 6 C. P. 247.

remedies, that the property which is improved, and which has had the benefit, must bear the *onus*. There are the words "that such expenses shall be a charge on the premises in respect of which they were incurred," and the premises no doubt, mean the property which has been improved, and not any particular interest in the property. If there is any doubt as to that, it has been set at rest to some extent by what appears in the statute of 1858, in which the freehold is expressly in terms charged with the annual instalments, where the money is made payable in that way. If there be a charge, the *onus* lies upon the persons who say that that charge has been discharged or satisfied.

Now, in the first place, it was held by the Vice-Chancellor—a view which I am unable to concur in—that the bar of six months to the summary remedy applied also to any remedy for enforcing a charge, and there was a decision of this Court referred to that the optional remedy given to proceed either in the County Court or by summary proceeding, must be held to be limited by the same limit of time. Of course it is not for us now to reconsider that. That is the law of the land, and I quite agree in it, but that law has no application to the charge on the land. One never expects that a charge on land could be enforced within the limit of time given for summary proceedings. It never could have been enforced by anything that can be called by any stress of language summary proceedings, and therefore that view of the Vice-Chancellor cannot be maintained.

But in truth there is another view which is principally pressed upon us by the counsel for the Respondents in this case. That view, as I think, may be summed up in this way: "You had an election to retain the charge on the property, or to do some other thing by which you would get different remedies against different persons; that is to say, you had an election to allow the charge to remain or to declare the costs private improvement expenses." Now, in my opinion, there was really nothing that could be construed to be any election to give up the charge, nor is there anything in the Act of Parliament which seems to me to say that the charge is alternative for something else. There is nothing that I can find in the Act of Parliament which, either expressly or by implication, amounts to anything of that kind.

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If the Act of Parliament does not say either in words or in effect that if you do this you then give up your charge, then they never intended to elect and never did elect to give up the charge; they only elected to give themselves the additional remedy. I think Mr. *Higgins* was right in saying that it was an additional remedy, or another remedy. They gave themselves the easier and more expeditious remedy under the summary procedure which was given to them if they made it a private improvement rate. I cannot find anything in the resolution which amounts to a declaration on their part that they were giving up the charge, though I think for this purpose I should admit that the charge was reduced by a valid resolution to one payable in instalments with interest within fifteen years. But that provision which they were enabled to make, made in favour (if it was in favour) of the immediate occupier or owner of the premises for the time being under the power enabling them to give that benefit to the owner, did not imply that they were giving up the benefit of the charge they had for the entirety at the time, and the only effect, according to my view of that, would be that the charge could not be enforceable as long as the annual instalments were paid, but would only be enforceable after the instalments had fallen into arrear. I am of opinion that the Plaintiffs were entitled to have the charge, and as they actually only claim it from the time when they gave the notice, they are entitled to have the charge with the interest which they are claiming, and they ought to have the costs of the proceedings.

BRETT, L.J.:—

Mr. *Higgins* has convinced me that we ought to read sect. 62 of the Act of 1858 according to its plain grammatical construction, that so read it of itself imposes a charge upon the premises immediately the expenses have been incurred, and that there is no limitation of the time during which that charge is to remain effective. The condition upon which the charge is made to arise is nothing but this, "Where the local board have incurred expenses for the repayment whereof the owner is made liable." Directly, therefore, the local board have incurred such expenses, the section must be read as if immediately after that there came these words,

"Such expenses shall be a charge on the premises"—therefore directly from the moment the expenses which are named in that section have been incurred, such expenses are a charge on the premises, that is, the charge is imposed then and there by the statute. Moreover, the phrase is grammatically a phrase of addition, because the earlier part of the section names the other remedies to which the Board may resort, and it adds the words "and such expenses shall be a charge on the premises." Therefore it seems to me that upon the reading of that section, this is a charge the moment the expenses are incurred, and it is a charge which exists although other remedies exist at the same moment that that commences, or other remedies may by different processes be made to arise either as against the owner, who is in the first place the person liable, or as against other persons.

It is true that the owner is liable to another remedy the moment the expenses have been incurred which he ought to have defrayed himself. There is a remedy against him personally for the whole sum, which remedy is to be enforced within six months; but if the Board claim the whole payment from him at once, yet fail to recover it from him personally, and there are no means of recovering it from him by distress, or if they pass by the personal remedy, then, if they have done nothing to prevent them from putting the charge into effect, I see no reason why the charge might not then and there be put into effect for the whole sum as against the owner. But the Board has also the power of causing other remedies as against other persons to arise. They may declare the improvements to be private improvement expenses. That is the first resolution which they may pass. Having done that, they may deal with that in one of two ways. Having declared the expenses to be private improvement expenses, they may make a private improvement rate, and if they do, they at once have a remedy against the occupier, and they may distrain upon the occupier, and the occupier is given a remedy over against the owner to a certain extent. If they do make a private improvement rate, they can only put their remedies upon that rate into effect under what are called *Jervis's* Acts; and if they do attempt to put their remedy into effect against the occupier, they are at once as against him limited in time. They may not only

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attempt to use the summary remedy, but, as it was said, may up to a certain amount sue in the County Court, and then the decision in *Tottenham Local Board of Health* v. *Rowell* (1), which, if I may venture to say so, was perfectly right, is that the same limit of time applies. But that limit only affects remedies which they have as against the occupier or owner personally by summary proceedings. Well, having declared those expenses to be private improvement expenses, there is another mode in which they may deal with it. They may come to a resolution that the whole sum shall be divided into instalments and spread over a certain number of years not exceeding thirty. If they do that, that at once gives them remedies against the occupier and against the owner. Having made the sum payable by instalments, I incline to agree, though it is not necessary to determine it in this case, with Mr. *Higgins*, that it makes the Act more reasonable and more fair, no doubt, to say that they could not retract that and insist, either by putting the charge into effect, or otherwise, upon an immediate payment of the whole. Having once made the sum payable by instalments, it must so remain; but then, it being payable by instalments, they have a summary remedy against the occupier, or against the owner, as each instalment falls due. Although they have all these remedies they may be ineffectual, because the occupier may be unable to pay, the owner may be unable to pay, there may not be sufficient to enable them to recover by distress; all those remedies may fail; but if they do fail, it seems to me that there is nothing which upon the failure of these remedies has done away with that charge, which existed from the beginning, and which is not limited in time upon the arising of any condition subsequent by any words in the Act from the beginning to the end; but where the payment has come to be a payment by instalments, then I think that if the charge is to be made effective, it could only be made effective for instalments in arrear. So that, if the sum had been made payable by instalments in fifteen years, and the payments were in arrear for seven years, then if the charge were attempted to be put into force, it could only at the end of those seven years be put into force for the seven years' instalments in arrear, and then, if afterwards further instalments became in arrear, it must

(1) 1 Ex. D. 514.

be put into force again. All the remedies, which are either existing at the time when the charge takes effect, or which are, by following the forms of the statute, made to arise after that charge has taken effect, have nothing to do with the charge; they make it neither greater nor less. If those remedies fail, or are not put into effect, nevertheless the charge, which exists absolutely independently of them, may always be made effective by the process of the Court, and therefore, there being no limitation of time as to that, except, I suppose, the ordinary Statutes of Limitation, there is no objection to that remedy which has been a remedy belonging to the Board from the moment after these expenses were incurred, being now put into force, and that remedy is put in force by means of the suit which has been brought. I, therefore, after having been puzzled for a sufficiently long time, think I can see my way to a clear reading of this section, having been so taught to read it by Mr. *Higgins's* argument, and therefore venture to differ from the Vice-Chancellor, and to think that this remedy was one which ought to have been allowed.

I should like to say that I think nothing we hold here is inconsistent at all with the case in the Queen's Bench (1), which only dealt with the other remedies given by statute, and did not deal at all with this remedy of putting the charge into effect.

COTTON, L.J.:—

This is an action by the Local Board of *Tottenham* to enforce a charge which they claim to have against the property of the late Mr. *Rowell* for certain expenses incurred by them. What took place was this, as I understand it: They determined, under sect. 69 of the Act of 1848, to do certain works authorized by that section in certain streets where Mr. *Rowell* had property, and before they executed the work they passed a resolution saying that the expenses should be treated as private improvement expenses, and be chargeable on the particular property, and that the amount should be made payable by instalments over a certain period of years. That they afterwards modified by, I think, reducing the term of years, but that is not very material. In

(1) *Wilson* v. *Corporation of Bolton*, Law Rep. 7 Q. B. 105.

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respect of the proportion of Mr. *Rowell* as applying to his property, they claim a charge upon his estate.

The first question which one has to consider is this, whether the Act of Parliament gives them the charge which they claim, and, if it does, whether the Act of Parliament or the act of the parties, the Plaintiffs, has prevented them, under the circumstances, from enforcing that charge.

Now, in my opinion, sect. 62 of the Act of 1858, which is incorporated with the Act of 1848, does give them that charge, and in construing that section of the later statute it is not immaterial to consider the period at which that enactment was made, because there the first Act having given certain remedies, this Act, probably having regard to the difficulty of recovering the money in all cases by means of the remedies so given as against what is there described as the owner—a very artificial person whom it might be very difficult to ascertain—and also the remedies given as against the occupier, does give a charge probably in order to remedy a difficulty and to cure any defect which there might be in the remedies given by the previous Act. Now what it says there is, "Where the local board have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable." I need not read the rest, for it goes through the different ways in which he may be made liable, and, amongst others, it mentions the Act of 1848. Then, when we come to the 69th section of the Act of 1848, we find this: "And the expenses incurred by them in so doing (that is to say, by doing the work in dispute in the street) shall be paid by the owners in default according to the frontage of their respective premises." That makes the owner liable. No doubt there are superadded remedies—summary remedies partly as against the owner and partly as against the occupier, with a right to go for a proportion on the owner, but there by the Act the owner is made liable by the declaration that the amount shall be paid by the owner. That makes him liable, and makes him liable under the Act, subject nevertheless to power given in the subsequent part of that section to enforce, by summary proceedings, either against the owner or occupier. So that, in my opinion, when it is found that under the Act of 1848 these are expenses

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in respect whereof the owner is made liable, there is a charge given. As that is so, what one has to consider is this, whether or no the local board are in any way prevented from enforcing that charge, and the only point on which the Vice-Chancellor decided it against them was the limit of time, and, as I understand, probably the length of time independently of any limit fixed by the Act. In the Act of Parliament there is no limit of time expressly fixed as that before which they must enforce the charge given by sect. 62. The only limit of time is that which is given with reference to summary proceedings either against the owner or occupier, and there is no reason why you should apply to the period of enforcing the charge the same limit as that which the Act gives as the period for enforcing, by summary remedy, against the owner or the occupier personal payment of the expenses. This Act taken together with *Jervis's Act* fixes six months as the limit of time. It is true that where one of these Acts gave an option to enforce the personal remedy against the owner by proceedings in the County Court, the Court of Appeal held that the same limit of time applied to proceedings in the County Court as applied to summary proceedings before the magistrates. But one might shew numerous cases where it would be almost impossible to enforce a charge or to begin to enforce a charge against the land within the period of six months which was given for enforcing the personal remedy against the owner or occupier, though I do not think it is convenient or right to deal with it by shewing what inconvenience would arise. What I say is this, there is no limit at all fixed by the Act with reference to anything except proceedings against the person who is liable personally. As against the land, there is to be a charge for the sum payable with interest at £5 per cent. per annum, with no limit fixed as to the time within which that charge is to be enforced, and, in my opinion, the only proper limit of time is that which the *Statute of Limitations* fixes. Of course the parties may have a personal objection to the claim by the local board, that is to say, they may say, "You have been so negligent in enforcing your remedies, that the person who ought to pay instead of me has now escaped and you are coming upon me," but nothing of that sort arises in the present case. Whether it could be ever effectually urged by any

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owner or purchaser, I say not; it is sufficient to say that it does not arise in the present case, where the Defendant, who was a debtor when the work was done and when the money ought to have been paid, would be so now if he had been alive, and, not being alive, his property or his representatives stand in the same position as he did. Therefore the lapse of time, in my opinion, cannot be relied on.

The more serious argument was that there had been an election to treat these as improvement expenses, and therefore to treat them as only recoverable by rate against the occupier. There, I think, the error in the argument depended on the word "only." If there is anything in the Act which shews that where there is an election to treat them as private improvement expenses all other remedies are gone, that would be something, but there is nothing at all to shew that treating them as private improvement expenses to be recoverable by way of rate would get rid of the charge on the land. The charge on the land is not given by sect. 62 as regards expenses which shall not have been declared to be private improvement expenses, but generally in respect of all expenses for which the owner is made liable, that is, liable when they are incurred; and unless there is something definite in the Act which shews that the local board shall give up their charge when they determine to deal with the expenses under the latter part of the section, or to deal with them under sect. 23 of the Act of 1861 as payable in instalments, we ought not, in my opinion, to deprive the local board of that tangible security given by the 62nd section to which I have referred.

The case has been referred to which Lord Justice *Brett* has just mentioned, *Wilson* v. *Corporation of Bolton* (1), but that was an entirely different case. They had called upon the owner in the first place to pay the sum at once, and then they would have had a summary remedy for a limited time as against him. After they had lost that remedy they declared the expenses to be private improvement expenses, and sought to recover them by means of another summary proceeding, and there it was quite right to say, "You cannot get this new summary proceeding when by what you have done, and by your delay, you have lost the original

(1) Law Rep. 7 Q. B. 105.

summary proceeding which you had before you exercised any option." That makes the case an entirely different one from the present where we are dealing, not with the question whether the Board can get for themselves a new and extended summary proceeding and remedy against a different person, but whether they have by what they have done lost the charge given to them by the Act where there are no words in the Act releasing that charge, and where there is nothing in the Act which shews that they must elect whether they will continue to have a right to the charge, or take this proceeding of enforcing it as an improvement expense.

Sect. 23, I think, does help Mr. *Higgins's* argument, for what it did in fact was not to declare that the money should be recoverable by rate, but that the payment should be extended over a period of years, and sect. 23 does assume that that section shall apply to cases where there is a charge on the property in respect of the expenses which are to be distributed over a period of years, and in no way says that by so distributing the payment of the expenses the Board shall lose the charge which has been previously given them, and which this section assumes they have at the time when they determine so to collect the expenses instead of calling for payment of all at one time.

In my opinion, therefore, there was originally a charge, and the right to enforce that has not been lost by the local board, nor has it been in any way taken away by any of the other sections.

Solicitors for Plaintiffs: *Heath & Parker.*
Solicitors for Defendants: *Peckham, Maitland, & Peckham.*

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C. J. B.
Feb. 25;
March 1.
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June 10, 17;
July 15.

Ex parte BISHOP.
In re FOX, WALKER, & CO.

Proof in Bankruptcy—Principal and Surety—Compulsory or Voluntary Payment by Surety—Guarantie of Bill of Exchange—Payments by Guarantor to Holder—Interest—Practice—Appeal—Time—Notice by Respondent—Rules of Court, 1875, *Order* LVIII., *rr.* 6, 9, 15.

It being proved to be the common and almost invariable practice of bill brokers in the city of *London*, not to indorse each bill of exchange which they have discounted for a customer when they re-discount it with their bankers, but to give to the bankers a general guarantie for all bills which they re-discount with them:—

Held, that when an accommodation bill is drawn and accepted for the purpose of raising money for the drawer and the acceptor, the drawer in discounting the bill with bill brokers in the city of *London* has an implied authority from the acceptor to deal with them in the ordinary course of their business, and, consequently, that the bill brokers have an implied authority from the acceptor to make themselves liable on the bill under their guarantie to their bankers, and are, in the event of the bankruptcy of the acceptor, entitled to prove against his estate for what they have paid to the bankers in respect of the bill under their guarantie:

Held, also, that the bill brokers are entitled to prove against the estate of the acceptor for interest upon the amount which they have paid under their guarantie.

Petre v. *Duncombe* (1) and *Hitchman* v. *Stewart* (2) approved and followed.

A notice given by the Respondent to an appeal under rule 6 of Order LVIII. of the Rules of Court, 1875, need not be given within the time limited by rule 15.

IN January, 1875, Messrs. *Fothergill & Hankey*, who carried on business as the *Aberdare Iron Company* and the *Plymouth Iron Company*, drew some bills of exchange, for sums amounting in the whole to £19,958 7*s.* 10*d.*, upon Messrs. *Fox, Walker, & Co.* of *Bristol*, which the latter firm accepted. In the same month *Fothergill & Hankey* drew another bill for £2542 18*s.* 6*d.* on *Fox, Walker, & Co.*, which they also accepted. All the eight bills were to become due in July, 1875. The bills were all accepted for the accommodation of the drawers, except that the acceptors were to receive £5000, part of the proceeds thereof, and they in fact

(1) 2 Lown. Max. & Poll. Pr. Cas. 107. (2) 3 Drew. 271.

received that sum. *Fothergill & Hankey* indorsed the first seven bills to Messrs. *Sanderson & Co.*, bill brokers, in the city of *London*, who discounted the bills for them. The eighth bill was discounted by Messrs. *Glyn & Co.*, bankers in the city of *London*, to whom it was indorsed by *Fothergill & Hankey*. *Sanderson & Co.* rediscounted the seven bills with the *London and Westminster Bank*. They did not indorse the bills to the bank, but they had on the 11th of April, 1871, given a guarantie to the bank as follows:—

"In consideration of your discounting for us any bills you may approve and think fit from time to time, we hereby guarantee the due payment of them as they respectively fall due."

When the bills were discounted by *Sanderson & Co.*, *Fox, Walker, & Co.* were not in fact aware of the existence of this guarantie.

Mr. *Henry Smith*, the sub-manager of the bank, made an affidavit in which he said, "It is the well known and almost invariable custom for bankers in *London* on receiving bills for discount from bill discounters and brokers to take from them letters of guarantie" similar to that given by *Sanderson & Co.* to the bank in this case, "the intention and effect of such letters of guarantie being to render the bill brokers responsible for the bills discounted for them in every respect as if they had separately indorsed such bills, and thus to obviate the necessity for the separate indorsement of each bill, which in practice, if not absolutely impossible, would be productive of great inconvenience and trouble in view of the thousands of bills which are daily discounted."

On the 31st of May, 1875, *Fothergill & Hankey* suspended payment, and in consequence of their suspension *Sanderson & Co.* also suspended payment on the same day. *Fox, Walker, & Co.* failed to pay the bills when they became due. *Fothergill & Hankey*, on the 5th of June, 1875, filed a liquidation petition, under which a trustee of their property was appointed on the 15th of September, 1875. A scheme for the settlement of their affairs was afterwards sanctioned by their creditors, and approved of by the Court of Bankruptcy, under the provisions of sect. 28 of the *Bankruptcy Act*, 1869. This scheme provided (*inter alia*) that the

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whole of the joint assets of *Fothergill & Hankey* (except such as were specified in a schedule) should be made over to a company called the *Aberdare and Plymouth Iron Company, Limited*, and that the company should issue to each of the joint creditors of *Fothergill & Hankey* B debentures of the company for the amount for which each creditor should prove in the liquidation, and that the liquidator should apply the property specified in the schedule (after the discharge of certain prior payments) in payment of dividends to creditors on account of the B debentures. The *London and Westminster Bank* and *Glyn & Co.* had proved in the liquidation of *Fothergill & Hankey* upon the bills, and were entitled to B debentures of the company for the amount of the bills.

On the 28th of December, 1875, *Sanderson & Co.*, with the consent of their creditors, executed a deed whereby they conveyed and assigned all their partnership property and assets to *William Turquand*, on trust for sale, and collection and distribution of the net proceeds among their creditors in the manner therein mentioned. Under this deed *Turquand* paid to the *London and Westminster Bank* three dividends, amounting in the whole to £3575 17*s.* 2*d.*, in respect of the seven bills of which they were the holders, the three payments being made on the 31st of December, 1875, the 2nd of June, 1876, and the 19th of July, 1876.

Prior to the 3rd of March, 1876, *Fox, Walker, & Co.* had paid to the *London and Westminster Bank* and to *Glyn & Co.* (in respect of the seven bills held by the bank and the one bill held by *Glyn & Co.*, and in proportion to the amounts of the bills held by the bank and *Glyn & Co.* respectively) the sum of £5625 5*s.* 9*d.* On the 3rd of March, 1876, a deed was executed between *Fox, Walker, & Co.* of the first part, the bank of the second part, and *Glyn & Co.* of the third part, which contained a recital that the bank and *Glyn & Co.* had agreed to accept the security hereinafter expressed in discharge of £16,876 0*s.* 7*d.*, the remainder of the sum of £22,501 6*s.* 4*d.* (the amount of the eight bills). And *Fox, Walker, & Co.* covenanted with the bank and *Glyn & Co.* that they would pay to them the sum of £16,876 0*s.* 7*d.*, or such portion thereof as should not be discharged under the provisions

of the following clauses by half-yearly instalments (in proportion to the amount of bills held by the bank and *Glyn & Co.* respectively) of not less than £2000 each, on the 1st of May and the 1st of November in each year, commencing on the 1st of May, 1876, and should give their promissory notes in respect of each instalment.

The deed contained (*inter alia*) the following clauses:—

(3.) "All dividends and sums of money which any of the parties hereto may be entitled to receive in respect or on account of the said sum of £22,501 6*s.* 4*d.*, or any portion thereof, from the estate of the drawers of the said bills, or any person other than *Fox, Walker, & Co.*, shall be applied in reduction of the sum for the time being remaining unpaid."

Clause 4 provided that all debentures or other securities of the *Aberdare and Plymouth Company* issued in respect or on account of the £22,501 6*s.* 4*d.* should be forthwith handed to and retained by the bank as security for the payment of any portion thereof for the time being remaining unpaid, with power for the bank, with the concurrence of *Glyn & Co.*, at any time to sell and realize the same or any part thereof from time to time at discretion, and to apply the proceeds in reduction of the £22,501 6*s.* 4*d.*

By clause 6, as a further security for the payment of the said sum, *Fox, Walker, & Co.* granted and assigned to the bank the lands, buildings and hereditaments comprised in a lease granted to them in March, 1864, for ninety-nine years, and the entire undertaking or works known as the *Atlas Engine Works* of whatever tenure, and all the fixed and moveable plant, engines, and machinery thereunto belonging, tools, iron, coal, goods, utensils, articles, and things which then were or at any time during the continuance of the security should be in, on, or about the works and premises, and belong to *Fox, Walker, & Co.*, to hold the same to the bank for all the estate and interest of *Fox, Walker, & Co.* therein (except as to any leasehold portion the last day of the term therein), with power for the bank, with the concurrence of *Glyn & Co.*, at any time after default in payment of any half-yearly instalment, to take possession of the premises thereby granted and assigned, and to let, sell, realize, or otherwise deal with the same or any portion thereof without notice, in all respects

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as if the bank were the absolute owners thereof, and to exercise any of the powers conferred on mortgagees by the Act 23 & 24 Vict. c. 145.

Clause 8. "These presents and the security hereby given shall operate and enure for the benefit of the bank and *Glyn & Co.* proportionately to the amount of the bills held by them respectively."

Clause 9. "Nothing herein contained nor the receipt or acceptance by the bank or *Glyn & Co.* of any sum of money or security under these presents shall release or discharge the drawers or any other persons liable in respect of the said bills or any of them, or in any manner prejudice or affect any claims, rights, or remedies, which the bank or *Glyn & Co.* now have, or but for these presents would or could have against any such persons, nor any security held in respect thereof, and the same claims, rights, remedies, and securities shall be and remain as absolutely inviolable and intact as if these presents had not been executed."

This deed was prepared in September, 1875, but it was not executed until March, 1876. In the interval between its preparation and execution the bank had received the first dividend under *Sanderson & Co.'s* deed of assignment. The omission of any reference in the deed of the 3rd of March, 1876, to this payment was apparently accounted for by the payment not having been made at the time when the deed was prepared. The promissory notes were given by *Fox, Walker, & Co.* to the bank and to *Glyn & Co.* in accordance with the provisions of the deed, and the first note was paid when it became due. The others were not paid.

On the 11th of December, 1878, the bank commenced an action in the Queen's Bench Division against *Fox, Walker, & Co.* The indorsement on the writ stated that the Plaintiffs claimed against the Defendants as acceptors of the seven bills of exchange drawn by *Fothergill & Hankey*, and the claim was for "Balance of principal due £7123 6*s.* 5*d.* Interest to date of writ £1804 12*s.* 3*d.*," making a total of £8927 18*s.* 8*d.* On the 13th of December, 1878, *Fox, Walker, & Co.* filed a liquidation petition in the *Bristol* County Court. In the statement of their affairs which they produced to their creditors they mentioned among their liabilities—"*London and Westminster Bank* hold *Fox, Walker, & Co.'s* acceptances

of the *Aberdare Company's*" (*i.e. Fothergill & Hankey's*) "drafts" (mentioning the seven bills for £19,958 7*s.* 10*d.*), "on which is now claimed £8926 19*s.* 2*d.*" And they mentioned as another liability "*Sanderson & Co.* £4089 12*s.* 4*d.* for dividends paid by them on *Fox, Walker, & Co.'s* acceptances of the *Aberdare Company's* drafts held by *London and Westminster Bank*, together with interest thereon."

The proceedings in the action were restrained by an injunction granted by the County Court. The bank claimed to prove in the liquidation in respect of the seven bills, as did also *Glyn & Co.* in respect of the eighth bill. Negotiations were entered into by the trustees of *Fox, Walker, & Co.* for the compromise of these claims, and ultimately a compromise was agreed upon, which was sanctioned by an order of the County Court dated the 18th of April, 1879, whereby it was ordered that the trustees should be at liberty to pay to the bank and *Glyn & Co.* "the sum of £2000 in satisfaction of their claims upon the leasehold property, plant and machinery and other effects of the said debtors or otherwise against the estate of the said debtors, and as a consideration for the transfer of the rights of the bank and *Glyn & Co.* upon such bills of exchange bearing the names of the said debtors as are held by the bank and *Glyn & Co.*" under the circumstances set forth in an affidavit of *Henry Bishop*, one of the trustees. *Turquand* was not in any way a party to this compromise. The £2000 was, on the 24th of April, 1879, paid by the trustees to the solicitors who were acting for the bank and *Glyn & Co.*, and on the payment being made there were handed over to the trustees the lease of the debtors' premises, the deed of the 3rd of March, 1876, and the unpaid promissory notes. The trustees signed a receipt for these documents, which stated that the payment was made "in discharge of all liability to the bank and *Glyn & Co.* of *Fox, Walker, & Co.* and their estate in respect of the bills accepted by them and particularised in the schedule to the deed of the 3rd of March, 1876, or otherwise, but which payment of £2000 is made to and received by the bank and *Glyn & Co.* expressly without prejudice to all their rights against and to the receipt of all dividends from the estates of any other parties liable in respect of such bills."

Turquand, as trustee of *Sanderson & Co.*, tendered a proof in

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the liquidation of *Fox, Walker, & Co.* for £3575 17*s.* 2*d.*, and for £515 5*s.* 1*d.* interest thereon up to the commencement of *Fox, Walker, & Co.'s* liquidation. In his affidavit of proof *Turquand* said that *Fox, Walker, & Co.* were indebted to him in the sum of £3575 17*s.* 2*d.*, which he, as trustee of *Sanderson & Co.*, had paid to the bank in respect of the seven bills, and in the sum of £515 5*s.* 1*d.* for interest thereon. This proof was rejected by the trustees, and the rejection was affirmed by the Judge of the County Court. *Turquand* appealed to the Chief Judge.

The appeal was heard on the 25th of February and the 1st of March, 1880.

Winslow, Q.C., and *J. E. Linklater*, for the Appellant, referred to *Ex parte Turquand* (1); *Mertens* v. *Winnington* (2); *Ex parte Wyld* (3); *Ex parte Mutton* (4); *Simpson* v. *Eggington* (5); *Bankruptcy Act*, 1869, s. 31.

Bompas, Q.C., and *Romer*, for the trustees of *Fox, Walker, & Co.*, referred to *Ellis* v. *Emmanuel* (6); *England* v. *Marsden* (7).

Bacon, C.J.:—

I am bound by the rules of equity and the provisions of the *Bankruptcy Act* relating to the proof of debts. The words of sect. 31 of the Act fully and completely define what are debts provable in bankruptcy. [His Lordship read the section and continued:—]

The present case is simply this. Bills of exchange are current which *Sanderson & Co.* apply to their bankers in *London* to discount, and according to their custom when dealing with these things (it is not pleaded as a general custom), but according to the custom by which *Sanderson & Co.* carried on their business it was their practice not to indorse the bills which their bankers discounted for them, but to give the bankers a guarantie that they would be personally liable in the same manner as they would have been if they had indorsed the bills. Having given that

(1) 3 Ch. D. 445.
(2) 1 Esp. 112.
(3) 2 D. F. & J. 642.
(4) Law Rep. 14 Eq. 178.
(5) 10 Ex. 845.
(6) 1 Ex. D. 157.
(7) Law Rep. 1 C. P. 529.

7 Jur. N.S. 294

guarantie they therefore became liable on the bills to the bank, and this nobody disputes. Then the surety, having on behalf of his principal, the acceptor, entered into such an engagement, it enures to his own benefit, and he thereupon, if he has to pay under his guarantie, becomes the creditor of his principal. And if by handing these bills to the *London and Westminster Bank* for discount, and giving their guarantie to pay them at maturity, Messrs. *Sanderson & Co.* become liable to pay the debts of their principals, the acceptors, why have they not a right to prove against their estate? The reason suggested is this, it is said that the bills are in the hands of the bank, and that there cannot be two proofs in respect of the same bills of exchange. What the bank mean to prove against *Fox, Walker, & Co's.* estate, I cannot tell. Reference has been made to a deed entered into between Messrs. *Glyn & Co.*, the *London and Westminster Bank*, and the debtors, *Fox, Walker, & Co.*, by which some arrangement between them was made for the discharge of the existing debt, and the bills in question were undoubtedly contained in the schedule of that deed. But no notice of this was given to *Sanderson & Co.*, they are no parties to the deed, and their assent to or acquiescence in it was not in any way requested.

What then has altered their position? If they paid the bank £3575 in respect of the bills, they had in the terms of the 31st section a provable debt against *Fox, Walker, & Co.'s* estate. If they paid that amount for them before the bankruptcy it is plain that they might have sued them for it as a debt, and the fact that the bankruptcy has happened does not change their position. The sum which they paid was part of the £19,958 for which the bills were given, and if the bank had come to prove against the estate of *Fox, Walker, & Co.* the day after they had received the £3575, they could not have proved for any more than the £19,958, minus the £3575 which they had received from *Sanderson & Co.* There can be no double proof in respect of that £3575. If by any transaction subsequent to the deed of 1876, the relations of debtor and creditor between *Fox, Walker, & Co.* and the *London and Westminster Bank* have been affected in any way, how can that affect the right which *Sanderson & Co.* had when they paid the £3575 on behalf of *Fox, Walker, & Co.*? The sum so paid

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must of necessity have been a portion of the sum for which the bank would have been entitled to prove against *Fox, Walker, & Co.* if they had been bankrupt at the time, and for which, if they were not bankrupt, *Sanderson & Co.* would have had a right to sue them.

That is the way in which the case presents itself to me. I have nothing to do with the arragement which was made by the deed; there is nothing in it which can affect the rights of other persons than those who are named in it. If the £8000 which is now said to be due to the *London and Westminster Bank* is sought to be proved in the bankruptcy of *Fox, Walker, & Co.*, it will be time enough for their trustees to say whether that £8000 includes the £3575, part of the bills for £19,958, which the bank received before *Fox, Walker, & Co.* became bankrupt.

I therefore decide this case on the terms of the 31st section of the *Bankruptcy Act*, and without reference to all that has been said about custom. I think there was a custom, not a custom of merchants but a practice, by which *Sanderson & Co.* gave their personal undertaking to be liable on the bills, by which they were bound, and they having satisfied that liability to the extent of £3575, it would be impossible now that the bankruptcy has happened to enter into any negotiations about the bills so as to include the £3575 which had been paid before the bankruptcy, and before any right of proof whatever could have arisen on them. I am of opinion that there will be no double proof, but only that proof which *Sanderson & Co.* are entitled to make against the estate of *Fox, Walker, & Co.* I think, therefore, that the proof ought to be admitted for the sum paid to the bank, but I do not admit the claim for interest.

C. A. The trustees appealed to the Court of Appeal, their notice of appeal being given on the 15th of March, 1880.

Afterwards Mr. *F. W. Fox*, one of the partners in *Fox, Walker, & Co.*, made an affirmation in which, after mentioning the acceptance by his firm of the seven bills drawn by *Fothergill & Hankey*, he said: "I afterwards learnt that the said bills had been discounted by the drawers thereof with *Sanderson & Co.*, and that *Sanderson & Co.* had discounted the said bills with the *London*

and Westminster Bank. I wrote the letter of the 14th of June, 1875, under the impression and belief that *Sanderson & Co.* were liable to the bank as indorsers of the said bills, and it was not until long after the commencement of the liquidation of my firm that I became aware of the liability of *Sanderson & Co.* depending upon a document signed by them in the year 1871." The letter of the 14th of June, 1875, referred to in this affidavit was written by *F. W. Fox* in the name and on behalf of his firm, to the manager of the *London and Westminster Bank.* It was written shortly after the stoppages of *Fothergill & Hankey* and *Sanderson & Co.*, and it contained a proposal for a payment by *Fox, Walker, & Co.* to the bank of a composition of 5*s.* in the pound upon the seven bills held by them. It spoke of the bills as drawn by the *Aberdare Iron Company* and indorsed by *Sanderson & Co.*, and it contained the following passage: "We should hope that with the dividends payable on the *Aberdare Company* and *Sanderson & Co.'s* estates there would be no eventual loss to your bank, and we trust that under the circumstances you will see your way to accede to our proposal." And, with reference to the negotiations which took place prior to the compromise of the claims of the bank and *Glyn & Co.* against the estate of *Fox, Walker, & Co.*, Mr. *Inskip*, the solicitor to the trustees, made an affidavit in which he said, "I informed Mr. *Braithwaite* (the solicitor of the bank and of *Glyn & Co.*) that I could not admit any claim of Mr. *Turquand* to rank as a creditor against the estate of the debtors, and I declined to make or accept any stipulation which would involve the recognition of such claim."

An affidavit was also made by Mr. *Braithwaite*, in which he set forth a letter written by his firm on the 21st of April, 1879, to the solicitors of *Fox, Walker, & Co.'s* trustees. This letter contained the following passage: "Payment of the £2000 is of course expressly received without prejudice to the rights and claims of the bank and Messrs. *Glyn* against any other parties liable, and to receive dividends from their respective estates, and the original bills cannot therefore be actually given up. It is also irrespective of, and does not comprise Mr. *Turquand's* proof as trustee of *Sanderson & Co.* in respect of the payments made by *Sanderson & Co.* on account of the bills."

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On the 28th of April, 1880, *Turquand* gave notice to the trustees that on the hearing of their appeal he would apply to the Court to vary the order of the Chief Judge by admitting the proof for the £515 5*s.* 1*d.*, claimed for interest, in addition to the £3575 17*s.* 2*d.*

C. A.

The appeal was heard on the 10th and 17th of June, 1880.

Romer (*Benjamin*, Q.C., with him), for the Appellants :—

The position of *Sanderson & Co.* in consequence of their guarantie is not the same as if they had indorsed the bills. By the law merchant the indorser of a bill of exchange is a surety for its payment; he has the liability of a surety, and he has the rights of a surety against the acceptor. But a person who guarantees the payment of a bill without indorsing it must, in order to make the acceptor liable for anything which he pays under his guarantie, shew that he executed the guarantie at the request, express or implied, of the acceptor. If he does not do this, any payments made under the guarantie are voluntary payments so far as the acceptor is concerned, and cannot be recovered from him. No one can give himself the rights of a surety as against the principal debtor; in order to acquire those rights the person who claims them must shew that he became a surety at the request, express or implied, of the principal debtor: *Addison* on Contracts (1). The only exception, if it can be called an exception, is the case of an indorser of a bill of exchange. There the request is implied by the law merchant. In *Sleigh* v. *Sleigh* (2) the drawer of an accommodation bill, which when it was due was dishonoured, paid a part of it to the holder without having received notice of dishonour, and without any request from the acceptor, and it was held that he could not recover what he had so paid from the acceptor. The principle of that case applies to the present.

[JAMES, L.J.:—In that case it was admitted by Baron *Parke* that if the Plaintiff had voluntarily paid the whole bill, he could have sued the acceptor, because he would then have become the holder of the bill, and would have been entitled as such by the

(1) 7th Ed. p. 870. (2) 5 Ex. 514.

law merchant to sue upon the bill. An indorser of a bill is not entitled to sue upon it, unless he becomes the holder.]

It is clear that *Fox, Walker, & Co.* had no notice of the guarantie; it was not given with their knowledge or consent, and no request by them can be implied.

Moreover, as between the bank and *Fox, Walker, & Co.*, there has been a complete settlement and discharge of the liability of the latter upon the bills. The bank were the holders of the bills and had a full right to give a discharge of the liability upon them. The settlement was of the balance, after accounting for what had been already paid in respect of the bills. It can make no difference that *Sanderson & Co.* had previously paid the £3575 17*s.* 2*d.*

[THESIGER, L.J.:—If *Sanderson & Co.* had indorsed the bills could the bank have proved against the estate of *Fox, Walker, & Co.* for more than the balance virtually unpaid of the bills? and, if so, could not the persons who had paid a part of what had been paid to the bank have proved for that part?

JAMES, L.J.:—Would that apply to payment under an officious guarantie?]

An indorser of the bills who had paid a part might have that right.

[THESIGER, L.J.:—Then if the officious guarantor paid a part could the bank prove for the whole amount or only for the balance? would not the officious payer of part have, at any rate, a right to use the name of the holder of the bill to prove for what he had paid?]

It must be shewn either that the guarantie was given at the request of *Fox, Walker, & Co.*, or that the payments under it were made at their request. This has not been done.

Winslow, Q.C., and *J. E. Linklater*, for the trustee of *Sanderson & Co.*:—

The main argument before the Chief Judge was, that, if our claim was admitted, there would be in effect a double proof.

[JAMES, L.J.:—There would not be a double proof. If the

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holder of a bill receives part payment from a person who is liable to pay him, he can only prove against the acceptor's estate for the balance.]

But if the drawer had paid part of the bill the acceptor could still be sued by the holder for the whole, because there could be only one action, though the holder would be a trustee for the drawer of the excess when he recovered against the acceptor: *Byles* on Bills (1).

The evidence of the bank manager is uncontradicted, that it is the almost invariable custom of bill brokers in the city of *London* to give a general guarantie to their bankers, instead of indorsing every bill which they rediscount with them. This custom must be taken to be well known to persons who are in the habit of sending bills to bill brokers to be discounted, and an authority from *Fox, Walker, & Co.* to *Sanderson & Co.* to make themselves liable on the bills must be implied. *Fox, Walker, & Co.* authorized *Fothergill & Hankey* to take the bills into the market and to raise money upon them in the ordinary way. This implied an authority to *Sanderson & Co.* to become sureties for the payment of the bills, and can it signify that that authority is exercised in a form different from that which the acceptors anticipated? In substance the agents followed the directions of the principal; the difference is in form only. If an indorser of a bill, being sued by the holder, pays him part of the amount of the bill, he can recover what he thus pays from the acceptor in an action for money paid to his use: *Pownal* v. *Ferrand* (2). A payment made voluntarily for the purpose of relieving a bankrupt's estate from liability has been ordered to be repaid out of the estate: *Ex parte Mutton* (3).

At any rate there has, in the present case, been a complete ratification of the payments made by *Sanderson & Co.*, both by *Fox, Walker, & Co.* themselves and by their trustees. There may be a ratification after action brought: *Simpson* v. *Eggington* (4). It is clear that the agreement of compromise between the bank and *Fox, Walker, & Co.'s* trustees was only intended to refer to the bank's claim for the balance after giving credit for what they had received from *Sanderson & Co.* If *Sanderson & Co.* had been

(1) 12th Ed. p. 223.
(2) 6 B. & C. 439.
(3) Law Rep. 14 Eq. 178.
(4) 10 Ex. 845.

indorsers of the bills *Fox, Walker, & Co.*, or their trustees, could not by any dealing with the bank alone have got rid of *Sanderson & Co.'s* claim; and if they knew, as they clearly did then, that *Sanderson & Co.* were sureties to the bank for the payment of the bills, they could not behind the backs of *Sanderson & Co.* make any agreement with the bank for releasing their claim.

Romer, in reply:—

There has been no ratification of the payments made by *Sanderson & Co.* When they were entered in *Fox, Walker, & Co.'s* statement of affairs as creditors, it was supposed that they had indorsed the bills. The compromise made by the trustees with the bank was intended to get rid of all liability upon the bills. The payments made by *Sanderson & Co.* to the bank were not made under compulsion, for they voluntarily gave the guarantie: *England* v. *Marsden* (1). One difference between a guarantie and an indorsement of a bill of exchange is this, that the guarantor would not receive any notice of the dishonour of the bill. And, even if an indorser of a bill of exchange waives his right to receive notice of dishonour and pays part of the bill, the payment is voluntary: *Sleigh* v. *Sleigh* (2).

JAMES, L.J.:—

I am of opinion that the decision of the Chief Judge ought to be affirmed. It appears to me that it would be contrary to ordinary notions of justice if the trustee of *Sanderson & Co.* was not allowed to prove against the estate of *Fox, Walker, & Co.* for the amount paid by the estate of *Sanderson & Co.* to the bank in respect of the bills. The claim is made in respect of bills of exchange upon which the debtors, *Fox, Walker, & Co.*, were liable. A sum of money was paid on account of the bills by *Sanderson & Co.* to the bank, who were the holders of the bills, and then, so far as the bank were concerned, only part of the bills remained due, and the bank claimed to prove for that part against the estate of *Fox, Walker, & Co.*, the debtors. The trustee of *Sanderson & Co.* now claims to prove against the estate for the sum which he has paid to the bank. It is objected that the bills were

(1) Law Rep. 1 C. P. 529. (2) 5 Ex. 514.

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not indorsed by *Sanderson & Co.* But the bills were drawn and accepted as accommodation bills; they were created only for the purpose of raising money, and it did not signify who was the drawer or who was the acceptor. The names of the drawers and acceptors were put on the bills for the purpose of making them negotiable instruments which were to go into the world as such. The money was to be raised partly for the benefit of the drawers, and partly for the benefit of the acceptors; the bills were to be put into circulation for their joint benefit. It did not signify to the bill brokers which of them were the drawers and which the acceptors. It was the same thing as if they had both gone together to *Sanderson & Co.* and asked them to discount the bills. It must have been perfectly well known to both drawers and acceptors that *Sanderson & Co.* were carrying on an enormous business as bill discounters, and that they could discount the bills only by procuring advances from their bankers, *i.e.*, that they would rediscount the bills. In fact it is part of the Appellants' case that *Fox, Walker, & Co.* supposed in the first instance that *Sanderson & Co.* would put their names on the bills as indorsers, in which event it is admitted that there would have been no doubt or difficulty in the matter, but that *Sanderson & Co.* would have been entitled to make this proof. But it is proved that according to a well-established usage it is the common and almost invariable practice of bill brokers in the city of *London* not to go through the form of putting their names upon every bill which they rediscount with their bankers, but to give instead a general indemnity or guarantie to their bankers, by which they undertake to be liable to the bankers upon each bill which they rediscount with them just as if they had indorsed that bill. This fact must have been well known and understood by the gentlemen who manufactured these bills. I am aware of no authority and I can see no principle for holding that the liability which is created by such a guarantie differs from that which is created by the indorsement of a bill of exchange. No special authority is ever given by the acceptor of a bill of exchange to the holder of it to indorse it when he parts with it. It must have been known to *Fox, Walker, & Co.* that *Sanderson & Co.* could not get the money for the bills from their bankers without making

themselves liable upon the bills. I am of opinion that by the making of a negotiable instrument sufficient authority was conferred on *Sanderson & Co.* to make themselves liable on the bills to their bankers, and that *Sanderson & Co.* paid the bankers under compulsion just as much as if they had indorsed the bills. It was a mere accident that *Sanderson & Co.* did not by their guarantie confer on the bank a formal authority to write their names on the bills as indorsers. If the case had stood in this way, I think there would have been quite enough to support the decision of the Chief Judge. But I am of opinion on the facts that the payment by *Sanderson & Co.* to the bank was recognised and adopted by *Fox, Walker, & Co.* and their trustees on that footing, that all the dealings between them took place on the footing of that payment having been made, and that the effect of this ratification is not destroyed by *Fox, Walker, & Co.* saying, We thought there was an indorsement of the bills by *Sanderson & Co.*, and we now find that there was only a guarantie. I think that this makes no difference in the truth and substance of the transaction. Beyond all question the only thing which was compromised was the balance for which the bank claimed to prove after giving credit for the payment which had been made to them by *Sanderson & Co.* There was no release of the bills of exchange, and if the compromise did not exhaust the whole amount of them, it is clear that the bills have never been satisfied. The only question would be whether the bank should prove for the balance as trustees for *Sanderson & Co.* It seems to me unnecessary to go through that form, and I think that the proof may be made by *Sanderson & Co.* in their own name. It appears to me that there is no rule of law or technicality which prevents justice being done.

Cotton, L.J.:—

I also am of opinion that the proof has been rightly admitted for the sum of £3575 17*s.* 2*d.*, which was paid by *Sanderson & Co.'s* trustee to the holders of the bills which were accepted by *Fox, Walker, & Co.* That sum was paid under the letter of guarantie which was given according to the usual practice of bill brokers in the city of *London*, by *Sanderson & Co.* to the bank, and

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which applied to these particular bills, though it included them only in general terms. It is conceded that if *Sanderson & Co.* had indorsed the bills to the bank they could have recovered from *Fox, Walker, & Co.* any sum paid by them to the bank in respect of the bills less than the whole amount of the bills. The case of *Pownal* v. *Ferrand* (1) is an authority in support of that right, and it is the necessary result of the rule of law which is stated by Mr. Justice *Keating* in *England* v. *Marsden* (2), "that, where one man is compelled to pay a debt for which another is legally responsible, the law will imply a promise by the latter to indemnify the former." In the present case there can be no doubt that *Sanderson & Co.* were compelled to pay the bank under their guarantie. It is urged, and in my opinion rightly, that every kind of compulsion will not entitle a person who pays a part of a bill of exchange to recover what he so pays from the acceptor; that right will not arise unless the compulsion is undertaken at the request, express or implied, of the person who is primarily liable to pay the bill. But why is it that the indorser of a bill of exchange is in that sense of the word under a compulsion to pay it if it is not paid by the person primarily liable? Because, in my opinion, every one who puts a bill in circulation impliedly authorizes every holder of the bill to indorse it over, and thus to transfer to the indorsee his rights against the acceptor, and if the indorser pays the bill he does so under a compulsion undertaken by the implied authority of the acceptor. In the present case, in my opinion, an implied authority was given by *Fox, Walker, & Co.* to *Sanderson & Co.* to incur the liability which they actually did incur. The drawers of the bills in procuring them to be discounted must be taken to have been acting on the behalf of *Fox, Walker, & Co.* as well as on their own. *Fox, Walker, & Co.* authorized them to deal with the bills in the ordinary course of business for the purpose of getting them discounted. In applying to *Sanderson & Co.* to discount the bills the drawers acted within that authority, and that conferred on *Sanderson & Co.* an authority to deal with the bills in the ordinary course of the business of bill brokers in the city of *London*, and consequently to give the letter of guarantie to the bank. And the payment made

(1) 6 B. & C. 439. (2) Law Rep. 1 C. P. 532.

by *Sanderson & Co.* to the bank in pursuance of the guarantie was made under a compulsion undertaken by them by the implied authority of *Fox, Walker, & Co.*, and consequently they are entitled to prove against their estate for what they have so paid. I decide the case on this ground, and it is, therefore, unnecessary for me to enter into the effect of the arrangements which were made between the bank and *Fox, Walker, & Co.* and their trustees.

THESIGER, L.J. :—

The question to be decided resolves itself into one of fact, and upon it the evidence is really all one way I will assume that the rule of the civil law does not apply; in other words, I will assume that a voluntary payment of a debt made by a stranger does not give him any right of action against the person who was liable to pay it. I will assume also that *Sleigh* v. *Sleigh* (1) was rightly decided, and therefore that the indorser of a bill of exchange who pays it without having had any notice of dishonour, though he waives his right to have that notice, has no right of action against the person who is primarily liable to pay the bill. I will further assume that *England* v. *Marsden* (2) was correctly decided, in other words, that, though a person who has been compelled to pay a bill of exchange has a right of action against the person primarily liable, he has no such right when he has voluntarily placed himself in the position of being compelled to make the payment. Though, however, I assume for the purpose of the present case that those cases were rightly decided, I will not say that I do not think they may be open to further consideration when the occasion for it arises, for I think that the observations of the late Mr. Justice *Willes* in *Cook* v. *Lister* (3) are well worthy of consideration. In the present case it must be admitted that if *Sanderson & Co.* had indorsed the bills to the bank, and had paid them, they would have had a right of proof against *Fox, Walker, & Co.'s* estate. And it is equally clear that if the guarantie had been given to the bank in pursuance of an agreement to which *Fox, Walker, & Co.* had been parties, or if *Sanderson & Co.* had paid the bank with

(1) 5 Ex. 514. (2) Law Rep. 1 C. P. 529.
(3) 13 C. B. (N.S.) 543, 594.

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the assent of *Fox, Walker, & Co.*, either before or after the payment was made, their right of proof against *Fox, Walker, & Co.'s* estate must have been admitted. It is clear, however, that *Sanderson & Co.* did not indorse the bills, but there is strong evidence that they became sureties to the bank for the payment of the bills by the authority of the acceptors, implied if not expressed. At any rate, it is clear that the payments made by *Sanderson & Co.* were adopted by the acceptors, and that the benefit was taken by them, and therefore they must also bear the burden. At every stage of the proceedings the evidence is strong to that effect. The bills were put into the market. We ought at any rate to infer that an authority was given by the acceptors to the drawers to get the bills discounted in the ordinary way by some bill brokers, and therefore that an authority was given to the bill brokers to rediscount the bills. Then, upon the evidence, we must find that it is the almost invariable practice of bill brokers, or rather of bill discounters, in the city of *London*, for the purpose of convenience, not to indorse the bills which they rediscount with their bankers, but to give to their bankers a general floating guarantie which covers all the bills rediscounted by them. And, dealing with the matter as one of fact and evidence, the proper inference to be drawn from the existence of this custom is, that an authority was given by the acceptors to *Sanderson & Co.* to deal with these bills in the way in which they were ordinarily in the habit of dealing with bills which they rediscounted. It follows that there was an authority or an implied request by the acceptors to *Sanderson & Co.* to pay the bills in pursuance of the guarantie which they had given. And, going a step further, it appears to me that there was an authority to make the payments which they afterwards made. When the negotiations for the deed of March, 1876, were carried on, it was recognised by all the parties that payments would be made by *Sanderson & Co.* to the bank, and, putting a reasonable construction upon the 3rd clause of that deed, I cannot doubt that it covers this very case. And the inference I draw from that deed, and from what passed at that time, is this, that whether or not an original authority was given by the acceptors to *Sanderson & Co.* to pay the bank, there was then a request made to them, or an authority given to them, by the

acceptors to pay the money which they paid to the bank in respect of the bills. This conclusion seems to me to be clearly borne out by the subsequent conduct of the parties in the year 1878. The action was then brought by the bank for the balance due upon the bills, after giving credit for what had been paid by *Sanderson & Co.* Then *Fox, Walker, & Co.'s* statement of affairs treated the bank as creditors only for the balance of the amount of the bills, after deducting what *Sanderson & Co.* had paid, and treated *Sanderson & Co.* as creditors in respect of the amount which they had paid upon the bills, and, so far as can be gathered from the evidence, *Fox, Walker, & Co.'s* trustees adopted that which had been done by them. And, finally, the compromise was made between the bank and the trustees in April, 1879. It may well be that the trustees intended so to act as not to recognise any right of *Sanderson & Co.* to prove against the estate. But this is clear, that the compromise related only to the balance of the amount of the bills, after giving credit for the payments which had been made by *Sanderson & Co.* to the bank. I do not mean to suggest that there was any intention on the part of the trustees to act fraudulently, but it seems to me that it would be very improper now to use that compromise as against *Sanderson & Co.* to shew that they had no right of proof against the estate. I am of opinion that an original authority to *Sanderson & Co.* to enter into the guarantie is to be implied from the circumstances, and that both the acceptors and their trustees afterwards assented to the payments which were made by *Sanderson & Co.* to the bank, as being payments made at the request and on the account of the acceptors. The appeal must be dismissed with costs.

Winslow, Q.C., and *J. E. Linklater*, for the Respondent:—

The claim for interest ought to have been allowed by the Chief Judge, and we now ask in pursuance of our notice that his order may be varied in this respect.

Romer, for the Appellants:—

The notice was given too late; it ought to have been given within the twenty-one days allowed by rule 15 for appealing.

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[James, L.J.:—Under the old practice a cross appeal was allowed to be presented after the expiration of the time allowed for presenting an original appeal. And now we have power to extend the time for appealing, if necessary.]

This matter ought to have been made the subject of a distinct notice of appeal.

[James, L.J.:—The object of the rule was to prevent the necessity of two appeals. A man might well be satisfied if he got £50 instead of £52 which he had claimed, and yet if his adversary appealed he might say, I will now ask for the £2.]

Winslow, Q.C., for the trustee of *Sanderson & Co.*:—

The acceptors of the bills would have had to pay interest, and we have relieved their estate from that payment. Therefore we are entitled to prove for interest up to the adjudication.

Romer, for the trustees of *Fox, Walker, & Co.*:—

There was no contract to pay interest. It has not been decided that *Sanderson & Co.* stood in the position of indorsers of the bills for all purposes. Sect. 28 of the Act 3 & 4 Will. 4, c. 42, does not apply. The question of interest was not really argued before the Chief Judge.

[James, L.J.:—If a surety pays part of a debt which bears interest, does that entitle him to interest from the principal debtor?]

No. He has a right to be paid what he has paid under his guarantie. If he intends to claim interest he should give notice to the principal debtor. I do not admit that the bank could have claimed interest. If a surety makes a payment to the creditor and does not tell the principal debtor, why should he be entitled to interest? If he had told the principal debtor, he might have repaid the amount paid at once: *Byles* on Bills (1).

Winslow, in reply:—

A person who guarantees the due payment of a bill is liable for interest: *Byles* on Bills (1).

(1) 12th Ed. p. 309

June 15. COTTON, L.J., delivered the judgment of the Court (*James*, *Cotton*, and *Thesiger*, L.JJ.):—

We have already disposed of the principal appeal in this case, which raised an objection to the Respondent's right of proof altogether. We sustained the decision of the Chief Judge admitting the proof for the sum actually paid.

It is necessary shortly to state the circumstances of the case. The proof was against the estate of the acceptors of certain bills, and it was tendered by some bill brokers to whom the bills had been transferred by the drawers for the purpose of raising money. We thought that the object of the bills was to raise money for the joint purposes of the drawers and acceptors, or at any rate that the acceptors accepted them knowing how they would be dealt with, and we held that, although the bill brokers had not made themselves parties to the bills by indorsing them, but had given a guarantie to the bankers who advanced the money, they were entitled to prove against the estate of the acceptors for what they had paid under their guarantie, on the ground that there was an implied contract to indemnify them on the part of the acceptors who were primarily liable on the bills. The only question remaining was whether, the proof being allowed, a proof should be admitted for interest on the amount paid. Unfortunately, this point was not argued on the main appeal; it was the subject of a cross notice of appeal given by the Respondent. Probably, if it had been mentioned earlier it would have been argued, and the authorities which exist on the subject would have been brought before the Court and discussed. We reserved our judgment on this point, and we are now of opinion that the proof for interest ought to be admitted. If there had been no authority on the point, the matter would have been possibly more doubtful, but in several cases interest has been allowed on payments made both under express and implied contracts to indemnify. In *Petre* v. *Duncombe* (1), under a covenant by way of indemnity to a surety, interest was allowed by way of damages upon payments which had been made by the surety, it being held that on a contract to indemnify the person to be indemnified should be put in the same position as if the man who had contracted to

(1) 2 L. M. & P. 107.

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indemnify him had in fact done what he had contracted to do, that is, had paid the money at the proper time. And Vice-Chancellor *Kindersley*, in a very careful judgment in *Hitchman* v. *Stewart* (1), came to the same conclusion where there was only an implied contract by co-sureties to indemnify or repay another co-surety the amount which he had paid in excess of his fair proportion. There the Vice-Chancellor allowed interest, on the ground that there was an implied contract to indemnify, following the old case of *Lawson* v. *Wright* (2), where the point does not appear to have been argued, but interest was allowed under somewhat similar circumstances. That decision of Vice-Chancellor *Kindersley's* has been followed in the recent case of *In re Swan's Estate* (3), where the Court of Appeal in *Ireland* allowed interest under similar circumstances on the same principle on an implied contract to indemnify. Having regard to these authorities, and to the consideration that where there is a contract to indemnify, express or implied, the person who is to be indemnified ought to be put in the same position as if the act against which he is to be indemnified had been done by the person who is to indemnify him at the time when it ought to have been done, we are of opinion that the proof for interest ought to be admitted. That, of course, will be for interest up to the date of the adjudication.

The point seems not to have been argued in the Court below, so that we do not know on what ground the proof for interest was rejected.

Solicitors for Appellants: *Lawrance, Plews, & Baker*, agents for *H. Britten, Press, & Inskip, Bristol.*

Solicitors for Respondent: *Travers Smith & Braithwaite.*

(1) 3 Drew. 271. (2) 1 Cox, 275.
(3) I. R. 4 Eq. 209.

ATTORNEY-GENERAL *v.* CORPORATION OF BIRMINGHAM.

C. A.
1880
V.-C. B.
June 5.
C. A.
July 21.

Amendment after Decree—Adding Parties—Enforcing Decree against New Parties—Rules of Court, 1875, *Order* XVI., *r.* 13.

A decree was made in 1875 against the corporation of *Birmingham* as the sanitary authority of *Birmingham*, granting a perpetual injunction to restrain them from allowing sewage to flow into a river, the injunction being suspended for five years to give the borough an opportunity to execute certain works. At the expiration of that period the Plaintiffs desired to enforce the injunction, but in the meantime the *B. T. & R.* Board had succeeded to the rights and liabilities of the corporation of *Birmingham* in respect of the sewage:—

Held, by *Bacon*, V.C., that under Rules of Court, 1875, Order XVI., r. 13, liberty could be given to the Plaintiffs to amend their bill by making the *B. T. & R.* Board parties.

Held, on appeal, that such an amendment could not be made after final decree, and that the decree could only be enforced against the board by an action.

THIS was a suit instituted in 1858 by information and bill by Sir *C. B. Adderley*, now Lord *Norton*, to restrain the Defendants, as the sanitary authority for *Birmingham*, from polluting by sewage the River *Tame*. On the 16th of April, 1875, a decree was made granting a perpetual injunction to restrain the Defendants from allowing sewage to flow into the river, and the Defendants undertaking to carry on some works for purification of sewage which they had commenced, the operation of the injunction was suspended for five years from the date of the decree.

On the 29th of September, 1877, a provisional order was made by the Local Government Board under the powers of the *Public Health Act*, 1875, s. 279, forming the local sanitary district of the borough of *Birmingham* and some other local districts into a united district, called "*The Birmingham Tame and Rea Main Sewerage District*," for the purpose of dealing with the sewage of the district, and this order was confirmed by the Act 40 & 41 Vict. c. ccxxix. The united district was under the control of the *Birmingham Tame and Rea District Drainage Board*, constituted by the order.

The informant and Plaintiff being desirous of enforcing the

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injunction, applied to Vice-Chancellor *Bacon*, on the 5th of June, 1880, for leave to amend the information and bill by adding the District Drainage Board as Defendants.

Carson, for the summons:—

The new board is the body now liable to have the injunction enforced against it, and the Court has power under Order XVI., rule 13, to make the amendment sought in order that they may be before the Court.

Cozens-Hardy, contrà:—

An amendment of the pleadings for the purpose of adding parties cannot be made after decree. If the board has succeeded to the liabilities of the council of *Birmingham* the mode of enforcing the decree against them is by action.

BACON, V.C.:—

The terms of Order XVI., rule 13, are not limited to proceedings before decree. The rule says "at any stage of the proceedings." It provides that all persons added as parties shall be served with a summons or notice, so the board will have an opportunity of raising any defence that is open to them. The rule seems to have been made for the very purpose of meeting such a case as the present. The Plaintiff will have liberty to amend the information and bill by adding the new board as parties, and inserting proper allegations for that purpose. The direction in Order XVI., rule 15, as to filing and serving a writ of summons is not appropriate to this suit, which was commenced under the old practice, but a copy of the amended information and bill must be served on the new parties.

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The Defendants appealed. The appeal was heard on the 21st of July.

Sir *H. Jackson*, Q.C., and *Cozens-Hardy*, for the Defendants, having opened the case, were stopped by the Court.

Rodwell, Q.C., and *Carson, contrà*:—

We submit that the intention of the Act and Rules was to do

away with supplemental bills in the nature of original bills as well as ordinary supplemental bills. The order might rightly be made under Order XVI., rule 13.

[JESSEL, M.R.:—It was never intended to allow an amendment of the pleadings to introduce fresh parties after final judgment. The rule only applies before decree, for the parties are to be brought before the Court to enable it "to adjudicate upon and settle all the questions involved in the action." Here the questions have been finally adjudicated upon.]

Then an order might be made for the same purpose under Order L., rule 4.

[JESSEL, M.R.:—That rule says that "the proceedings in the action shall be carried on," which can only refer to a pending action.]

JESSEL, M.R.:—

The Vice-Chancellor must have been under some misapprehension as to the facts of this case. A statement of claim or bill cannot be amended after final judgment. If it becomes necessary to enforce that judgment against persons who have acquired a title after it was made, an action must be brought for that purpose. The order must be discharged with costs.

JAMES and BRETT, L.JJ., concurred.

Solicitors: *Paines, Layton, Cooper, & Pollock; Sharpe, Parkers, & Co.*

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July 21.

SEEAR *v.* LAWSON.

[1880 S. 100.]

Bankrupt Law—Commencement of an Action by Trustee in Bankruptcy—Assignment by Trustee of the Subject-Matter of the Action—Right of Assignee to continue the Action—Bankruptcy Act, 1869, *ss.* 4, 17, 25—*Rules of Court*, 1875, *Order* L., *r.* 3.

17 Ch D 170
— 338
19 Ch D 359

The trustee in bankruptcy of a man who had conveyed away some real property absolutely, commenced an action against the grantee to have it declared that the conveyance was a mortgage, and that the deed ought to stand as a security only for the money advanced. The action had proceeded no further than the issue of the writ, when the trustee sold and assigned the subject-matter of the action to a purchaser for value:—

Held, by *Bacon*, V.C., and by the Court of Appeal, that the assignee from the trustee in bankruptcy was entitled to continue the action.

Whether such a right could not have been assigned by the grantor himself, *quære*.

B. WEBSTER was adjudicated bankrupt in January, 1880, and the Plaintiff *Seear* was appointed trustee.

The writ in the present action, issued on the 4th of March, 1880, was indorsed to the effect that the Plaintiff, as trustee of *Webster*, the bankrupt, claimed to set aside an indenture dated the 9th of October, 1879, so far as it purported to be an absolute conveyance and assignment by *Webster* to the Defendant *Lawson* of the *Adelphi Theatre*, and other property freehold and leasehold, subject to mortgages; and to have it declared that the deed ought to stand only as a security for the sums actually advanced and interest; and for an account, the Plaintiff offering to pay what should be found due.

By a deed dated the 16th of March, 1880, *Seear*, as such trustee, in consideration of £2000 paid to him by *H. W. Chatterton*, assigned to *Chatterton* all his right and interest in the freehold and leasehold hereditaments and properties forming the subject-matter of the action.

On the 23rd of April, 1880, *Chatterton*, on a petition of course, alleging that by an indenture dated the 16th of March, 1880, the Plaintiff had assigned to the petitioner the whole of the premises

the subject-matter of the action, obtained the common order that the petitioner *Chatterton* should be at liberty to carry on and prosecute the action and proceedings therein in like manner as the same might have been carried on and prosecuted by the Plaintiff, if he had not assigned his interest, as in the petition alleged.

Lawson moved to discharge this order. No statement of claim had been delivered. *Lawson* adduced evidence that he had paid off the mortgages.

The motion was heard before Vice-Chancellor *Bacon* on the 4th of June, 1880.

Sir *H. Jackson*, Q.C., and *Grosvenor Woods*, for the motion:—

The order at the Rolls was made, as of course, on the authority of rule 3 of Order L. of the Rules of Court, 1875, which provides that in case of an assignment of any estate or title *pendente lite*, the action may be continued by the person to whom such estate or title has come. But the language of the rule of Court does not justify such an order as this; and this is not the sort of assignment which was contemplated by the rule.

The assignment of a right of action of this kind is utterly illegal. If we had been under the old practice, the suit must have been carried on in the name of the assignee, who must have pleaded the assignment, and we should have demurred on the ground of public policy. Here, by a misapplication of a new and useful rule, a demurrer has been escaped, but the attempt cannot be sustained.

It will be argued on the other side that what has been conveyed is only an equity of redemption. But that is not what was conveyed. The equity of redemption, we say, is gone, and the suit is an attempt to get it back again. That is a lawsuit; and the assignment of it, though not quite champerty, nor quite maintenance, is so like one or both, and so offensive, that the Court never gives effect to it: *Prosser* v. *Edmonds* (1); *De Hoghton* v. *Money* (2); *In re Paris Skating Rink Company* (3); *Tapp* on Maintenance (4).

(1) 1 Y. & C. Ex. 481.
(2) Law Rep. 2 Ch. 164.
(3) 5 Ch. D. 959.
(4) Page 39.

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Winslow, Q.C., and *Terrell*, for *Chatterton*:—

The order at the Rolls was perfectly justifiable and right.

At Common Law *choses in action* were not assignable on the ground of champerty; but that rule never applied in cases of bankruptcy.

By the 25th section of the *Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71), which is a re-enactment of former similar enactments, the trustee has power to bring or defend any action, suit, or legal proceeding relating to the property of the bankrupt. It was the policy of the law that such assignments as these should be made, and that the assignee or trustee should have the same right of action as the bankrupt himself had. In a case under sect. 111 of the *Bankruptcy Act*, 1869, which provides that "any person to whom anything in action belonging to the bankrupt is assigned in pursuance of this Act may bring or defend any action or suit relating to such thing in action in his own name," a man was held entitled to sue, who had bought a debt from his own trustee in his own liquidation: *Kitson* v. *Hardwick* (1).

In substance what has been bought and paid for in this case is the equity of redemption. What *Seear* wanted to have declared, and what *Chatterton* wants to have declared is, that the deed was really nothing more than a mortgage. The decision in *Dickinson* v. *Burrell* (2) by Lord *Romilly*, M.R., is distinctly in our favour.

No allegations of fraud or misconduct have been made; what we allege is an undisclosed collateral agreement between *Webster* and *Lawson*, the consequence of which is that a deed purporting to be an out-and-out conveyance is reduced to a mortgage.

The motion is misconceived, and must be refused.

Sir *H. Jackson*, in reply:—

The contention will hardly be carried so far as that a trustee in bankruptcy may sell a right to file a petition for divorce, or to bring an action for seduction, or for assault and battery.

[*Winslow*:—That is not property.]

The 111th section does not mention property; it speaks of "anything in action." The argument *ex absurdo* simply is, that

(1) Law Rep. 7 C. P. 473. (2) Law Rep. 1 Eq. 337.

the Court must put some limit upon the generality of the expression "anything in action," and the question is, what limit will it put? Relaxations of the common rule have been made by the law of merchants, and in favour of assignments of debentures, and of policies of assurance, but the relaxation has never been carried to the extent here contended for. The subject-matter of the conveyance was not an equity of redemption, a thing which is assignable, but a claim to set up an equity of redemption, a thing which is not. It was not the property that was sold, only a lawsuit. *Dickinson* v. *Burrell* (1) was decided on demurrer to a bill which alleged (2) that *James Dickinson* "conveyed" all his share in *Whitehead's* estate: and the Master of the Rolls seems (3) to have considered himself bound by this allegation.

BACON, V.C.:—

Sir *Henry Jackson* has put this forward as a novel case, and so, no doubt, to some extent it is. But the statute says in very plain terms (*Bankruptcy Act*, 1869, s. 111), that any person to whom anything in action belonging to the bankrupt is assigned in pursuance of the Act may bring any action or suit relating to such thing in action in his own name.

How does that apply to this case? An action is brought by a trustee in bankruptcy with the object of having it declared that a conveyance, absolute in terms, was intended only to be a security for the repayment of the money advanced, and he seeks to repossess the mortgage. That is the claim; and under the 25th section of the Act it is the right and duty of the trustee to bring any action, suit, or other legal proceeding relating to the property of the bankrupt. It cannot be denied that so far he would have a right to redeem the bankrupt's property. And sect. 15 of the Act includes in the bankrupt's property, divisible amongst his creditors, all such property as may belong to or be vested in the bankrupt, including things in action. It is beyond question that if the assignor had not become a bankrupt he would have had the right to bring this action. Then the right to bring the action must be property which has become vested in his trustee; and the 25th

(1) Law Rep. 1 Eq. 337. (2) Law Rep. 1 Eq. 338.
(3) Law Rep. 1 Eq. 343.

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section gives the trustee the right to bring any action, suit, or legal proceeding relating to the property of the bankrupt. How can the trustee in bankruptcy discharge his duty except by bringing such a suit as this? The statute also (sect. 25) enables the trustee to sell "all the property of the bankrupt," I suppose, in order to ensure the ready distribution of that property amongst his creditors.

The trustee in this case has thought fit to exercise his right by selling to Mr. *Chatterton* the property mentioned in the writ for a sum of money. Is that within the terms of the statute? The language of sect. 111 seems to shew that it is. The trustee, then, is not open to the charge of champerty. By selling the property he has sought, in discharge of his statutory duty, to realize the estate for the benefit of the creditors.

It is said that if Mr. *Chatterton* had brought this action in his own name, it would have been impossible to raise against him any question of maintenance or champerty. But then the *Bankruptcy Act* clears away any objection arising out of the assignment. It gives to the trustee the right to sell, and to anybody the right to buy, the property vested in him. The present purchaser does not desire to have any benefit beyond that of carrying on the proceedings in like manner as the same might have been carried on by the original Plaintiff if he had not assigned his interest.

There is nothing in the circumstances of this case to limit the benefit of the rule of Court. The proceeding is as much an action now as it ever was. Here is an assignment which, as often happens, is in terms absolute, but which, it is alleged, was intended only to be a security. That is the Plaintiff's contention, and the action founded on that contention may be, in my opinion, carried on and prosecuted by *Chatterton* in like manner as the same might have been carried on and prosecuted by *Seear*. If the action should fail, it will fail no less when continued by *Chatterton* than it would have failed if *Seear* had prosecuted it. It was competent for the trustee to sell, and no fault is to be found with him for the way in which he has exercised his power.

The motion must be dismissed with costs.

C. A. *Lawson* appealed. The appeal was heard on the 21st of July.

Sir *H. Jackson*, Q.C., and *Grosvenor Woods* for the Appellant:—

We contend that the assignment to *Chatterton* is void, as being a mere assignment of a right of suit: *Prosser* v. *Edmonds* (1). In that case it is laid down that "a *chose in action* not coupled with any party's interest in possession, and which cannot be reduced into possession without a suit, is not assignable in Equity," and there is no doubt that it was not assignable at Common Law. The test is, is there any right which can be asserted without bringing an action? In this case there is not. The deed of October, 1879, does not give an equity of redemption, and *Seear* had no interest unless he could succeed in turning what purported to be an absolute conveyance into something else. He could not be put in possession of anything without a suit. The Vice-Chancellor agreed with us on this head, and considered that if *Webster* had commenced the action he could not have made an effectual assignment, but his Lordship considered that a trustee in bankruptcy was, under the Act of 1869, in a better position. Sect. 4 of the Act defines "property." Sect. 25 enables the trustee to sell all the bankrupt's property, and sect. 111 enables a person to whom "anything in action" is assigned to sue or defend in his own name. The effect of these clauses, we submit, is no more than this, that the trustee in bankruptcy may vest in the transferee a perfectly good title to whatever he has a right to sell. "Property" can only include such things in action as by law are capable of being assigned.

[JAMES, L.J.:—This right of action certainly vested in the trustee as part of *Webster's* property.

JESSEL, M.R.:—The statute, therefore, has made one assignment of the right in spite of the law against maintenance.]

It does not follow that the trustee could sell what *Webster* could not have sold, and we do not admit that this is property which would vest in the trustee. If the trustee gets it, it must be under sect. 17, which vests in him the property of the bankrupt, and we say it is not property. But if it were, there are some kinds of property which are not saleable. Could an action for libel or for seduction be dealt with in this way?

(1) 1 Y. & C. Ex. 481.

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[JAMES, L.J.:—In those cases there is no property.]

Sect. 88, which deals with benefices, and sect. 89, which deals with half-pay, shew that there may be moneys coming to the hands of the trustees which are not to be dealt with according to the ordinary course, but in a particular way. There is not a word in the statute enlarging the power of *Webster* to sell this right, or giving his trustee a better right than he himself had. To make rights of action of this kind saleable would be very dangerous. A trustee could sell rights which he did not think worth enforcing to persons who would be willing to buy them up for the purpose of harassing the person in possession of the property.

[BRETT, L.J.:—If the trustee takes this right he takes it under sect. 17 as "property." Are we at liberty to say that in sect. 25 "property" is to be taken in a more restricted sense, and confined to property such as the bankrupt might have sold?]

Higgins, Q.C., *Winslow*, Q.C., and *Terrell, contrà*, were not called upon.

JESSEL, M.R.:—

The first proposition of the Appellant is, that Mr. *Webster*, the bankrupt, could not himself have conveyed or assigned this right or thing in action. I will assume that he could not, but without intending to decide that he could not, for it might be put that he was the owner of the equity of redemption, though he could only establish his right to it by setting aside the deed.

Now the word "property," as defined by the 4th section of the *Bankruptcy Act*, includes things in action. The trustee obtains the bankrupt's property under the 17th section on his appointment. The words are, "on the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed," and he gets the property in no other way.

The first question to be decided is, does he get such a right of action as this under the 17th section? I should say it is quite clear that he does. It would be impossible to hold that it remained vested in the bankrupt so that he could after his discharge

recover the estate for his own benefit. Therefore, under the word "property," it vests in the trustee and is now in the trustee. It is in the trustee by a statutory transfer, and for this purpose I assume that such a right could not have been transferred apart from the statute. Then the 25th section enables the trustee "to sell all the property of the bankrupt including," &c. It is suggested that the word "property" in the 25th section is to have a different meaning from that which it has in the 17th section. I cannot see why. It is the same word and under the same definition clause. If the trustee gets a right of action, why is he not to realize it? The proper office of the trustee is to realize the property for the sake of distributing the proceeds amongst the creditors. Why should we hold as a matter of policy that it is necessary for him to sue in his own name? He may have no funds, or he may be disinclined to run the risk of having to pay costs, or he may consider it undesirable to delay the winding-up of the bankruptcy till the end of the litigation. Considering these things, it seems to me to be *à priori* probable that he would be entitled to sell it, but I prefer to rest my decision upon the plain words of the statute. The words are, "all the property," and it does not appear to me that we have any right to exclude from the plain provision of the 25th section anything which has passed to the trustee under the 17th section.

I may mention that the 27th section, sub-s. 4, points in the same direction. Power is there given to the trustee, with the sanction of the committee of inspection, "to make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the bankrupt." It appears to me, therefore, that he must have a right to compromise such an action as this, and the policy of the law being to make one single transfer, so to say, from the bankrupt to the trustee for the purpose of distributing the property of the bankrupt amongst his creditors, we should be departing from what appear to me the plain terms of the Act of Parliament if we were to attempt to engraft upon the 25th section such an exception as is suggested by the Appellant.

It appears to me, therefore, that the Appellant has failed, and that the order of the Vice-Chancellor is right.

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JAMES, L.J.:—

I am entirely of the same opinion.

Whatever was vested in the trustee it seems to me that the trustee is authorized by the Act to sell, and he is entitled to sell instead of incurring the risk of litigation in his own name, and at his own expense. Supposing this were a right which never was in Mr. *Webster* at all; supposing, for instance, that the trustee had a right to impeach a deed by reason of its being a fraud upon the creditors, although it was a deed of which *Webster* himself could not have complained, that right would, in my opinion, have been equally saleable by the trustee as being part of the assets and property which the trustee was to get in for the benefit of the creditors. I desire to add, that although we decide this case upon the assumption that such a right as this could not have been assigned by Mr. *Webster* himself, I am by no means prepared to assent to the proposition that it could not.

BRETT, L.J.:—

Assuming this to be a mere right to bring an action, it seems to me that it could not pass to the trustee except by some enactment in the *Bankruptcy Act*. I think it did pass to the trustee, and Sir *Henry Jackson* was perfectly right in admitting at first that it did, although he afterwards retracted that admission. It does pass, and if so, then it passes by some word in the statute. What word? Under the word "property" in the 17th section. Then if "property" in the 17th section includes this right, does the phrase "all the property" in the 25th section include it? Why should it not? According to ordinary rules of construction we have no right to construe the same word in the same statute in a different manner or with different limitations, unless there is some context which enables us to do so. It is said that a limitation is to be introduced into the 25th section, because the assignment of such a right as this is against public policy. I do not think that that argument can be maintained, and therefore the word "property" must have the same signification in the 25th section as in the 17th section, and if so, it includes this right of action.

Solicitors for Defendant: *G. S. & H. Brandon.*
Solicitors for *Chatterton*: *Minet, Smith, & Harvie.*

POOLEY *v.* WHETHAM.

[1879 P. 1.]

C. A.
1880
V.-C. B.
July 9.
C. A.
July 11, 12, 17, 23.

Extradition Act, 1870 (33 & 34 *Vict. c.* 52), *s.* 19—*Offence committed before Surrender—Attachment for Contempt of Court—Collusive Proceedings.*

An attachment issued by the High Court of Justice for disobedience of an order of the Court in a civil action is not an offence within the meaning of the 19th section of the *Extradition Act*, 1870. Therefore, where a party to an action in the Chancery Division was arrested in *Paris* for a crime under the *Extradition Act*, and while in prison in *England* under the warrant was served with an attachment for disobedience to an order in the action:—

Held (affirming the decision of *Bacon*, V.C.), that the attachment was valid, and that the prisoner was not entitled to his discharge until he had cleared his contempt, although he had been acquitted of the criminal charge.

The 19th section of the *Extradition Act* is not confined to political offences, but applies to all criminal charges.

If a warrant under the *Extradition Act* is obtained, not for the *bonâ fide* purpose of punishing a person for a crime, but with the indirect object of making him amenable to an attachment in a civil action, the Court will relieve against such an abuse of the process of the Court.

THIS action was brought by *Alexander Gopsall Pooley* against the *Metropolitan Bank*, its chairman and secretary, for relief in respect of certain transactions relating to the *Jersey Railway*. The Defendants put in a defence and counter-claim. In the course of the litigation the Defendants obtained an order dated the 3rd of September, 1879, from the Vacation Judge, that the Plaintiff *A. G. Pooley* should give up possession of the *Jersey Railway* to *Francis Cooper*, who had been appointed by the Court receiver and manager of the railway. This order was served on *Pooley* personally, and, as he did not obey it, a writ of attachment was issued against him on the 20th of September for disobedience to the order of the Court.

On the 27th of September a petition for adjudication in bankruptcy was filed against *Pooley* on the petition of one *Toppin*, whose debt was then, or soon after, purchased by *Arthur Cooper*, the brother and partner of *Francis Cooper*, and *Francis Cooper* was appointed receiver thereunder.

On the 22nd of October, 1879, *Pooley* was adjudicated bankrupt,

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and soon afterwards left *England*. *A. Sheard* was appointed trustee in the bankruptcy. Afterwards, on the 5th of April, 1880, *Sheard* was removed from the trusteeship and *W. L. Holt* was appointed in his place, who appointed Mr. *Barnett* the solicitor in the bankruptcy.

On the 13th of May the trustee obtained from the Registrar in bankruptcy permission to prosecute *Pooley* for offences against the bankruptcy laws.

On the 22nd of May a warrant was issued under the *Extradition Act*, 1870, for the arrest of *Pooley* in *France*, the offences sworn to in the depositions being that on the 22nd of October, the day of his adjudication, he had fraudulently received £50 for a debt due to him and had not accounted for it to the trustee, and also that he had withheld his books from the trustee. *Pooley* attempted to prove that this warrant was taken out at the instigation of the *Coopers* and Mr. *Newman*, the solicitor of the *Metropolitan Bank* in order to bring him into this country and take him under the attachment, but this was denied by the Defendants and by both *Francis* and *Arthur Cooper*. *Pooley* was arrested in *Paris* on the 1st of June and brought over to this country and lodged in *Newgate Prison*.

On the 7th of June the Defendants obtained an order in Vice-Chancellor *Bacon's* Chambers to lodge the writ of attachment with the Governor of *Newgate*, and that *Pooley* when released from the criminal charge should be handed over to the Governor of *Holloway Prison* till he had purged his contempt.

On the 28th of June *Pooley* was brought up before the sitting magistrate at *Guildhall*, when he was acquitted of the charges against the bankruptcy laws: and he was then transferred to *Holloway Prison*.

On the 9th of July *Pooley* applied to the Vice-Chancellor to discharge him from prison.

Horton Smith, Q.C., and *Northmore Lawrence*, in support of the motion, contended, first, that the order detaining *Pooley* in prison was a violation of the 19th section of the *Extradition Act*, 1870 (1),

(1) 33 & 34 Vict. c. 52, s. 19: "Where in pursuance of any arrangement with a foreign state any person accused or convicted of any crime, which

and referred to the 3rd section also as illustrating the policy of the Act; and, secondly, that the criminal prosecution was got up in collusion with the Defendants in the action, and was simply a device to get *Pooley* into this country in order to serve the writ of attachment on him.

Sir *H. Jackson*, Q.C., and *A. Young*, for the bank.

Hemming, Q.C., and *Pollard*, for Mr. *Nalder*, the secretary of the bank.

BACON, V.C.:—

No doubt this case is one of very great importance, arising as it does upon a supposed view of an Act of Parliament which concerns not only the people in this country but in foreign countries.

The provisions of the Act of Parliament are very plain. It relates to crimes and nothing else; and the title of the Act is, "An Act for amending the Law relating to the Extradition of Criminals." [His Lordship read the sections referred to.]

Now, without going into the policy of the Act of Parliament further than the mere perusal of it renders it inevitable, nothing can be clearer than that the Act of Parliament deals with crimes, and with nothing else, for the public safety and for the sake of public justice. There is a power to procure the extradition of a fugitive criminal in order that he may be tried here. Then, in order to guard against it being used oppressively, there is that protection inserted in the Act of Parliament. What has that to do with the case of a man who, having been accused, and I must assume wrongfully accused, as he has been acquitted of the offence against the bankruptcy law, has been brought over here? Am I to hold that because the prosecution has failed that he is to be taken carefully back again to the place whence he came, that every outside influence is to be excluded, and that he is to have

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if committed in *England* would be one of the crimes described in the first schedule to this Act, is surrendered by that foreign state, such person shall not until he has been restored or had an opportunity of returning to such foreign state be triable or tried for any offence committed prior to the surrender in any part of Her Majesty's dominions, other than such of the said crimes as may be proved by the facts on which the surrender is grounded."

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a privilege which the subjects of Her Majesty do not enjoy, to go scathless and free from any demand which may be made against him? Surely I cannot read the Act of Parliament so. I can read the positive enactment that he shall not be tried, but he is not being tried when by reason of his disobedience to the orders of this Court there is an order for his committal—an order which he resisted, and which was decided against him. He refused to obey the process of this Court, and he refuses to this moment. Neither upon the terms of the statute, which I have looked at with the greatest care and caution, nor upon the meaning of the statute, can I find the slightest application to this case, that of a man who, being a suitor of the Court, defies the practice of the Court, and says that he places himself beyond the reach of it.

As to the merits, in my opinion they are disposed of by the fact that he appeared upon the occasion of the application for the order, resisted it, and the decision was against him, and, the decision being against him, he has made no attempt other than by a tag at the end of the present notice of motion to dispute that. It is too late for him to appeal against it. Then it is said that he is not able to comply with the order. I heard his affidavit upon the subject. What he says, curiously enough, is, "I was not in *Jersey* at the time," but he does not say, "Therefore I could not deliver up possession." A man who is not in *Jersey* at the time when he ought to have obeyed the order, of course could not then and there personally deliver up, but that is all he says by way of excuse for his non-obedience to the order of the Court. The Defendants in this suit did no more than the law entitled them to do. They lodged a writ of attachment with the officer on the allegation that the person sought to be attached was or soon might be in the custody of the officer with whom the writ was lodged. The motion must be refused with costs.

C. A. From this order *Pooley* appealed. The appeal came on for hearing by special leave on the 11th of July.

Sir *H. Giffard*, Q.C., *Horton Smith*, Q.C., and *Northmore Lawrence*, for the Appellant:—

In the first place, the arrest is proved to have been illegal by

the acquittal of the Appellant before the magistrate. Therefore the detainer under which he is now in prison was illegal, and he is entitled to be at once discharged: *Ex parte Ross* (1); *Chapman* v. *Preston* (2); *Hooper* v. *Lane* (3); *Bateman* v. *Freston* (4); *Ex parte Freston* (5).

[JAMES, L.J.:—But in the present case the arrest was not illegal although it was on a charge which proved to be unfounded.]

In the second place, the 19th section of the Act provides that a person who is arrested under the Act shall not be triable or tried for any offence committed prior to the arrest except a crime proved by the facts on which the surrender was grounded. The offence for which the Appellant was attached was an offence committed prior to the arrest, and was totally unconnected with the crime for which he was arrested. Therefore he is privileged from arrest in respect of it till he has been restored to the country from which he has been taken.

In the third place, the arrest of the Appellant was devised by the Defendants in collusion with the trustee in the bankruptcy for the purpose of getting him within the jurisdiction of the High Court of Justice in order to attach him in the civil action. This was an abuse of the criminal process. The *Extradition Act* was not intended to assist suitors in civil actions to enforce their rights: *Stein* v. *Valkenhusen* (6).

JAMES, L.J.:—

As to the argument upon the construction of the *Extradition Act*, we are all of opinion that there is nothing in that point, and that the attachment might be validly served on the Appellant notwithstanding the provisions of the 19th section. But we are not satisfied on the other point, namely, whether the Defendants were not precluded by their conduct from availing themselves of the arrest to enforce the attachment. On this point it is desirable that the Court should have full materials before it, and the case must stand over that the witnesses who have made affidavits may be examined in Court.

(1) 1 Rose, 260.
(2) 6 H. & N. 443.
(3) 6 H. L. C. 443.
(4) 3 E. & E. 578.
(5) 3 D. F. & J. 612.
(6) E. B. & E. 65.

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The argument accordingly was continued on the 17th and 23rd of July, when various witnesses were examined and cross-examined in Court. The effect of the evidence is stated in the judgment of the Lords Justices.

Hemming, Q.C., and *Pollard*, for the Defendants.

Young, for the bank.

Sir *H. Giffard*, in reply.

JAMES, L.J. :—

The more important question in this case, the public question apart from the importance to the individual concerned, is the construction of the *Extradition Act* of 1870. Originally, no doubt, the Act had reference to political offences; to prevent a man being brought into a country on what we should call an ordinary common law offence, and then to be tried for some political offence for which he would not have been extradited. However, the protecting section clearly extends beyond political offences, and its meaning is, that a man is not to be tried for any offence committed prior to the surrender other than some crime which may be proved by the facts on which the surrender is grounded. In my opinion, neither the words nor what is called the spirit of the Act of Parliament, that is to say, the true intent and meaning of the Act of Parliament, have any reference to what is really in this case a mere civil process. Although it assumes the form of punishment for contempt of Court, it is a mere civil process to enforce obedience to an order of a civil Court to do something on behalf of or for the benefit of a private person, which has no reference whatever to any offence committed against the State or against the Sovereign of the State, which are the offences mentioned there. It appears to me that it is impossible to extend the words to an attachment for a contempt which is really only a process of coercion to compel the performance of the order of the Court in what, as I have said, is a civil matter.

But then it did appear to us when the case was opened, notwithstanding the protest of Mr. *Hemming* and Mr. *Pollard*, that there

was no case at all made out in the affidavits on that point, that there were circumstances leading at all events to a suspicion that the extradition had been obtained by the Defendants for the purpose of bringing Mr. *Pooley* to this country in order that they might then have him within the jurisdiction of the Court, so that they might attach him for that contempt. Of course if that were so, if anything of that kind amounting to an abuse of the process of the Court were resorted to, independently of any *Extradition Act* or any other Act in the world, we should not have had the slightest hesitation in discharging him from the attachment which had been so obtained, as we should from an attachment obtained through any other fraud. Therefore we desired to have the matter investigated.

Now that the matter is investigated, it appears to me that that case, which of course has to be proved like any other case, and has to be proved, not by any suspicion, not by any inference from suspicious circumstances, but by evidence from which legitimate inferences can be drawn, has not been made out: that there is no evidence from which we can say that the parties have made out to our satisfaction that the Defendants were the persons who put in motion these proceedings under the *Extradition Act* in order to bring this gentleman here. Before we can arrive at that conclusion, in my opinion, we must actually pronounce four persons—the two *Coopers*, *Barnett*, and *Newman*—guilty of wilful and corrupt perjury—nothing short of wilful and corrupt perjury committed by them all four for the purpose of concealing and denying a most wicked conspiracy. [His Lordship then shortly referred to the evidence on this subject, and continued:—]

We are not trying an action for malicious prosecution against anybody, nor is it for us to say, what I cannot help thinking is the object of the greater part of the examination and cross-examination, whether any materials have been obtained to maintain such an action if such an action should ever be brought. We have nothing whatever to do with that point, or what will be the result if anything of that kind is done. But certainly it has not been proved to my satisfaction that there was any conspiracy or design or device on the part of the Defendants to bring the Appellant to this country on the criminal prosecution with a view of arresting

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him on the attachment; on the contrary, it has been satisfactorily disproved as far as I am concerned.

BRETT, L.J.:—

In this case Mr. *Pooley* was brought into this country under a warrant granted in virtue of the provisions of the *Extradition Act*, and he was brought here and imprisoned under such a warrant upon a charge of an offence against the bankruptcy laws which is one of the offences named in the *Extradition Act*. He was imprisoned here under that warrant until he was taken before the magistrates, and when taken before the magistrates he was discharged from that charge. But before he had been so discharged a detainer had been lodged at the prison in which he was confined, on the ground that before he came here he had been guilty of a contempt of Court, and an attachment was out against him, and it was claimed that he should be detained on that attachment for contempt of Court.

Upon that statement of facts it was argued by Mr. *Horton Smith* that the imprisonment under the warrant was illegal, and that therefore no detainer at all could have any effect. He said that he was illegally imprisoned, because he was finally acquitted of the charge. Now that certainly is an argument which to my mind cannot be sustained; for he was legally imprisoned, because he was imprisoned under a warrant of a magistrate who had jurisdiction to grant that warrant. That contention therefore fails.

It was then suggested that he could not be detained on the ground of this contempt, because that was an offence, within the 19th section of the *Extradition Act*, and was committed before he was surrendered to this country. It was suggested, and I only notice it because the statement is very erroneous, for fear that some other error should creep forward—it was suggested that the Act only applied to political offences, and that the meaning of it was that he should not be tried here for a former political offence, but that he might be tried for a former offence which was not political. Now, that seems to me a plain error, for the Act of Parliament plainly applies to all offences committed in this country before the time of the surrender.

But then comes the next question, which is whether a contempt

is, even though the contempt were committed before surrender, an offence such as is mentioned in the 19th section. Now the offence there mentioned is one which is thus described: "Where a person might be triable or tried for any offence." How is it possible to say that he was ever triable or tried for a contempt? It is not a matter which is a triable offence. It is a civil process under which he is detained, which he can get rid of at any time by purging his contempt, and it is not, in my opinion, a triable offence or an offence upon which a man can be tried at all. The real truth is that the word "offence" in the 19th section means a criminal act, whether a felony or a misdemeanor is immaterial, but an offence which would be triable in a criminal Court. Therefore it does not apply to civil processes, so that the objections which were founded on that reading of the statute all fail.

But then it was said that the bringing him here under the warrant which was granted under the *Extradition Act* was an abuse of the process of the Court, that is to say that he was not brought here *bonâ fide* for the purpose of being charged with an offence against the bankruptcy law at all, but that the process was used indirectly and improperly in order to bring him here for the purpose of taking him under the attachment. If the indirect motive had been made out, whether there were ground for the warrant or not, I should have thought that was an abuse of the process of the Court. Whether the person who was using the process might have had colourable evidence or not, if it could be made out that in his mind he was using the process indirectly and dishonestly, not with the intention of prosecuting, but with the intention of dropping the prosecution and bringing him here, only for the purpose of being enabled to enforce the attachment, I should have thought the Court would not allow its process to be abused, and that therefore it would have set aside the attachment at once.

Then comes the question whether that is proved. Now it seems to me that it is not. We are Judges of fact, and we have all three to make up our minds, and it would be useless to go over the facts again. My Lord has stated the reasons on which I am of opinion, as well as he is, that the contention is not made out. I think it may be said that the prosecution was a feeble

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one, and that it was feebly maintained, and as far as I can see I do not wonder it was feebly maintained; but that it was not *bonâ fide* instituted, I can see no sufficient ground for holding. Therefore there was no abuse of the process of the Court, and if there was no abuse of the process of the Court, then this attachment must remain.

COTTON, L.J:—

I am also of opinion that the appeal fails. It was put by Mr. *Horton Smith* on three grounds, on two of which we did not hear the Respondents. The first ground was that the arrest of the Plaintiff was illegal, and that therefore he could not be detained under the attachment. Now that was based simply upon this, that the charge was not sustained, and that when the matter came before the magistrates they said as far as that charge went he must be discharged; but that does not shew that the arrest was illegal in the sense of having been void, or to be treated in a Court of law as void. I do not go into the question whether or not there were reasonable grounds for the arrest. Even if there were no reasonable grounds for the arrest, yet the arrest was under a warrant issued by a magistrate who had authority to issue the warrant, and it cannot be considered as null and legally void in the sense in which processes have been treated as illegal in the cases which have been referred to by Mr. *Horton Smith*.

The second point was this: It was said that the detainer under the attachment was in violation of the express provision of the *Extradition Act*, and the section referred to was the 19th. The words of that section are these: "Such person shall not, until he has been restored or had an opportunity of returning to such foreign state, be triable or tried for any offence committed prior to the surrender in any part of Her Majesty's dominions other than such of the said crimes as may be proved by the facts on which the surrender is grounded." Now, it is difficult to see here what can be said to be the trial of Mr. *Pooley* when he was taken under the attachment; but I do not decide it on that ground. It is sufficient to say that in my opinion what is here forbidden is his being tried—whatever that may mean—for an offence against the criminal law. In a former part and in a subsequent part of that

section mention is made of crimes in respect of which a person can be taken under the Act, and although the word "crime" is not used where we find the prohibition, yet the offence there referred to, coupling it with what goes before and what goes after must, in my opinion, mean an offence against the criminal law, that is to say, a crime for which the offender can be tried, in the ordinary sense of the word, under the criminal law. But here there was nothing criminal. Incorrectly we say a man is guilty of gross contempt, that is to say, he has disobeyed an order of the Court in a civil proceeding, but that is not a crime or offence against the criminal law. It is one the Court is bound to deal with by committing the man to prison; but that is simply for the purpose of enabling a litigant who has got an order which has been disobeyed to obtain his civil rights, and it is a mere process to enforce civil rights, and not any proceeding for punishing a crime, as suggested. Therefore, in my opinion, the second objection fails.

The third objection, which has occupied a considerable time, I will now deal with. It was this, that the whole proceeding was collusive, that is to say, that the proceedings under the *Extradition Act* were taken, not for the purpose of getting Mr. *Pooley* here in order that he might be tried for an offence against the criminal law, but for the purpose of getting him here in order to enforce the attachment. Now it is not to the point to shew that some one else other than the persons who sought to enforce and did enforce the attachment had some indirect object in prosecuting Mr. *Pooley*. Even if that were made out it would avail nothing, unless it could be shewn that the persons who enforced the attachment were parties to that indirect object so as that it might be established to the satisfaction of the Court that on their part there was such fraudulent conduct, such abuse of the process of the Court, as to justify the Court in saying that those who had so unduly used the process of the Court by fraudulent and collusive conduct shall not retain the benefit of it. Fraud on the part of the Defendants must be established.

I give no opinion at all as to whether there was reasonable or sufficient ground for taking these criminal proceedings. I do not in the least intimate an opinion that there was not, but

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assume for the purpose of argument that it is doubtful whether there was sufficient reason for taking these criminal proceedings —assume, if you will, that it was ill-judged to take those proceedings, still that is nothing. It may be one step, and so it was used by Sir *H. Giffard* in saying that there could be no legitimate object in conducting those proceedings; we may seek for one, and what could it have been but the interest of the bank, with whom Mr. *Barnett* was acting, and whose object was to get the railway by enforcing the attachment? Possibly, if there was no reasonable ground for criminal proceedings, it may be a step, but what the Court must be satisfied of in order to discharge the order upon this ground is that there was a fraud on the part of the Defendants, who were seeking to enforce the attachment. Then we have here those who were really acting for the Defendants, one and all coming forward, and in no way shaken, saying that they in no way advised or were parties to the criminal proceedings.

[His Lordship then commented on the evidence, and concluded:—]

There is nothing, in my opinion, that raises a suspicion of any such fraudulent conduct on the part of the bank, or those acting for the bank,—nothing which would justify the Court in saying that there had been an abuse of the process of the Court, and that upon that ground the attachment ought to be discharged.

Solicitors: *Harper, Broad, & Battcock; Newman, Stretton, & Hilliard.*

Ex parte ABBOTT. *In re* GOURLAY.

C. A.
1880
C. J. B.
Feb. 16.
C. A.
July 15, 22, 29.

Bankruptcy—Secured Creditor—Elegit—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 12, 16 (*subs-s.* 5), 87.

Under a writ of *elegit* the sheriff is entitled to seize the debtor's goods at once, before the holding of the inquisition, and from the time of the seizure the creditor becomes a secured creditor within the meaning of sect. 16 (sub-sect. 5) of the *Bankruptcy Act*, 1869.

Sect. 87 has no application to a seizure of goods under an *elegit*.

Leave given to appeal to the House of Lords.

16 C.L.D. 339
17 C.L.D. 661-2
[illegible] 841-2-4
18 C.L.D. 134
140, 143
W.N. 84/58

WILLIAM GOURLAY carried on business as a chemical manufacturer at *Barrow-in-Furness* under the style of the *Barrow Chemical Company*.

On the 28th of June, 1879, *William Ormandy* signed judgment against the company in an action in the Common Pleas Division in the *Preston* District Registry for £207 8*s.* 9*d.*, debt and costs. On the same day *Ormandy* sued out a writ of *elegit* upon this judgment (Form No. 2, Appendix F, Rules of Court, 1875), and lodged the writ with the sheriff.

On the 30th of June the sheriff issued a warrant to his officer, commanding him "to seize and take all the goods and chattels of the *Barrow Chemical Company* (except their oxen and beasts of the plough) in my bailiwick, so that I may cause the same to be delivered to *William Ormandy* as by the said writ I am commanded." On the same 30th of June the sheriff's officer went to the works of the company, and took possession of certain goods and chattels of the company. On the 1st of July an inquisition was held before the sheriff at his office in *Preston*, when the jury found that the company, on the 28th of June, 1879, and on the date of the inquisition, "were possessed in their own right of the goods and chattels named in the schedule hereto of the price of £327, as of their own proper goods and chattels." The record of the inquisition stated that the sheriff had caused the goods and chattels mentioned in the schedule "to be delivered to the said *William Ormandy*, to hold as his own in satisfaction of his debt, costs, and interest in such writ named, as by such writ I am commanded." The jury also found that the company "were not on

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the 28th of June, 1879, or at any time afterwards, or any one in trust for them, seised or possessed of any lands or hereditaments, or any over which they had any disposing power which they might exercise for their own benefit without the assent of any other person." The proceedings on the inquisition commenced about 10.30 A.M., and were concluded at 11.15 A.M. on the 1st of July. Up to that time *Ormandy* had no notice of any act of bankruptcy having been committed by *Gourlay*. The same afternoon the sheriff delivered the goods mentioned in the schedule to the inquisition, which were part of those which had been seized on the 28th of June, to *Ormandy*. On the 1st of July, at 10.30 A.M., *Gourlay* had filed a liquidation petition in the *Blackburn* County Court. The trustee in the liquidation afterwards claimed the goods which had been delivered to *Ormandy* under the inquisition, and the Judge of the County Court held that he was entitled to them, on the ground that the sheriff had no power under the writ of *elegit* to seize any of the goods of the debtor until they had been appraised by the jury, and that consequently the creditor was not a secured creditor before the petition was filed. His Honour also held, on the authority of *Ex parte Rayner* (1), that sect. 87 of the *Bankruptcy Act*, 1869, applied to the case. *Ormandy* appealed to the Chief Judge.

The appeal was heard on the 16th of February, 1880.

Winslow, Q.C., and *E. Cooper Willis*, for the Appellant, referred to the *Bankruptcy Act*, 1869, ss. 12, 16 (sub-s. 5), 87, 95 (sub-s. 3); *Ex parte Rayner* (1); *Ex parte Villars* (2); *Ex parte Hesketh* (before *Bacon*, C.J., May 19, 1879).

De Gex, Q.C., and *Jordan*, for the trustee, referred to *Ex parte Williams* (3); *Bankruptcy Act*, 1869, ss. 12, 87, 95; *Dalton's* Office and Authoritie of Sheriffs (4); *Palmer's Case* (5); *Re Browne* (6); *Ex parte Rayner*; *Ex parte Villars*.

BACON, C.J.:—

Notwithstanding the ingenious argument on behalf of the Re-

(1) Law Rep. 7 Ch. 325.
(2) Ibid. 9 Ch. 432.
(3) Ibid. 7 Ch. 314.
(4) Page 56.
(5) 4 Rep. 74, a.
(6) 40 L. J. (Bkcy.) 48.

spondent, I cannot alter the decisions which have been come to in cases similar to this. In my opinion the execution has been rightly levied. Possession of the goods was obviously taken by the sheriff under the writ of *elegit*, and if he had not done so the jury could not have been put in motion. The writ of *elegit* directs the sheriff to cause to be delivered to the said *A. B.* by a reasonable price and extent all the goods and chattels of the said *C. D.*, to hold until the amount of his debt has been levied. Can anything be more clear than that, if the writ is to have any force, the judgment creditor by virtue of it became a creditor holding a security for his debt before the petition was presented, and that his right to the goods cannot be affected by the debtor's subsequent bankruptcy? Then it is said that because the goods were described in the inquisition as the goods and chattels of the debtor, the creditor did not hold any security until after inquisition found. But there was no other way in which the goods could have been described, and there was no admission of any right thereto in the debtor, and nothing to give him such a right.

When the sheriff by his bailiff did on the 30th of June seize and take possession of the goods, he could only hold them in trust for the execution creditor, and the inquisition which followed was merely a mode of perfecting the execution, by enabling the goods when appraised to be sold at a reasonable value, in order to satisfy the claim of the judgment creditor. Therefore it was that the jury were summoned, and until the sheriff had taken possession he could not put the jury in motion or point out to them what it was they had to value. The judgment creditor is, therefore, in my opinion, entitled to the fruits of his *elegit*. Then it is said that by adopting the creditor's contention that he was a creditor holding a security upon the property of the bankrupt I shall be affording a mode of evading the *Bankruptcy Act*, 1869, s. 87. I cannot add words to sect. 87. That section applies only to cases where the goods of the debtor have been taken in execution and sold, in which case the sheriff is to hold the proceeds in the manner and for the purpose therein provided. That is a special and distinct provision restrictive of the rights of a secured creditor in favour of the general body of creditors, and one which must be construed strictly. If creditors, in consequence of my judgment,

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take to issuing writs of *elegit* instead of writs of *fi. fa.*, I cannot help it. I quite admit the possible mischief pointed out by the Respondent's counsel, but I cannot alter the words of the section, which, in my opinion, do not apply to a judgment executed by writ of *elegit*. The writ having been issued, and the sheriff having seized the goods on the 30th of June, before any act of bankruptcy was committed, the sheriff has only done that which was his duty to do, viz., to have the goods appraised and delivered to the creditor as a security for his debt, and in my opinion the creditor is entitled to the fruits of his *elegit*.

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From this decision the trustee appealed. The appeal came on to be heard on the 15th of July.

De Gex, Q.C., and *Jordan*, for the Appellant :—

There are two questions—1. Whether a creditor who has sued out an *elegit*, under which the sheriff has seized goods of the debtor, is a secured creditor within the meaning of sub-sect. 5 of sect. 16 of the *Bankruptcy Act*, 1869, until the inquisition is finished. 2. Whether sect. 87 applies to a seizure of goods under an *elegit*.

With regard to a writ of *fi. fa.*, it has been held that, inasmuch as the sheriff has a special property in the goods when he has seized them, the execution creditor becomes a secured creditor upon the seizure : *Slater* v. *Pinder* (1) ; *Ex parte Rocke* (2). But a writ of *elegit* is entirely different in form from a *fi. fa.* (*vide* Rules of Court, 1875, Appendix F, Form No. 2). The sheriff must make a return to an *elegit*, or it is of no value, because the execution or extent is to be made by inquest (3) ; *Hoe's Case* (4) ; *Palmer's Case* (5). The sheriff has no right to seize the goods under an *elegit* until the inquisition is completed.

[BRETT, L.J. :—Has not the practice always been for the sheriff to seize the goods and then for the inquisition to be made as to their value?

JAMES, L.J. :—In the case of land the sheriff never gave actual

(1) Law Rep. 6 Ex. 228 ; Ibid. 7 Ex. 95.
(2) Law Rep. 6 Ch. 775.
(3) 1 Dyer, p. 100, b.
(4) 5 Rep. 90, a.
(5) 4 Rep. 74, a.

possession to the *elegit* creditor; he only gave him a legal title, and then the creditor must bring ejectment.]

In the same way the creditor must bring trover for the goods if he cannot get them otherwise.

[BRETT, L.J.:—The writ expressly commands the sheriff to deliver the goods to the creditor.]

It equally commands him to deliver the land, and yet he cannot give actual delivery. In *Dalton's* Office and Authoritie of Sherifs (1) it is said (2): "The sheriff himself cannot appraise the goods, nor value or extend the lands upon an *elegit*; neither can the sheriff upon an *elegit* deliver any goods in execution, or extend any lands, but only such as are appraised and valued by the jurors of the inquisition." The appraisement completes the title of the creditor, and he then becomes the owner of the goods appraised, but till then he is in no better position than is a creditor who has issued a *fi. fa.* but has merely delivered it to the sheriff, that is, he is not a secured creditor: *Ex parte Williams* (3).

[COTTON, L.J.:—May it not be that after the seizure and until the appraisement, the goods are a security to the creditor?]

The sheriff's duty is to deliver the goods at the price fixed by the jury. The writ of *elegit* is a statutory writ, and was first given by the *Statute of Westminster the Second* (13 Edw. 1, c. 18).

[COTTON, L.J.:—The statute leaves it doubtful whether the sheriff is to seize the goods before or after the inquisition. But has not the practice always been for the sheriff first to seize the goods and then to have them valued by the jury, and afterwards to deliver them at the appraised value to the creditor in satisfaction or part satisfaction of his debt?]

There can be no practice, for it has not been the practice to take goods under an *elegit*. The sheriff does not act on his own responsibility as under a *fi. fa.*, and he has no right to seize the goods until the value has been appraised by a jury. The form of the charge to the jury is given in *Churchill's* Sheriff Law (4). In *Tidd's* Practice (5) it is assumed that the first duty of the sheriff

(1) Ed. 1623.
(2) Page 56.
(3) Law Rep. 7 Ch. 314.
(4) Page 341.
(5) 9th Ed. p. 1034.

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under an *elegit* is to empanel a jury, who are to make the inquiry. The sheriff is to deliver the goods, and he cannot do that until he knows what he is to deliver; he has no duty to seize until he has to deliver, that is, not until after the inquisition. The result is that until then the creditor has no security. Even a right to seize does not give security: *Ex parte Williams* (1).

But, even if the seizure gave the creditor a security, sect. 87 applies, the debtor being a trader, if not in words, yet in spirit. In *Ex parte Rayner* (2), though there had been only a seizure of goods under a *fi. fa.*, and there had been no sale, and the debtor had filed a liquidation petition the day after the seizure, the Court held that sect. 87 applied, and that the trustee was entitled to the goods.

Winslow, Q.C., and *E. Cooper Willis*, for the creditor:—

The writ requires the sheriff to deliver to the creditor all the goods of the debtor (with certain exceptions) in his bailiwick of which the debtor was possessed on the day on which the judgment was entered up or at any time afterwards. The intention was to bind the debtor's goods from the date of the judgment, just as at Common Law the debtor's goods were bound under a *fi. fa.* from the teste of the writ. This was altered by the *Statute of Frauds*, 29 Car. 2, c. 3, s. 15, which provided that no writ of *fi. fa.* or other writ of execution should bind the property of the goods but from the time that the writ should be delivered to the sheriff. That applies to writs of *elegit*. The goods are bound as against the debtor from the time of the delivery of the writ to the sheriff, and the creditor becomes a secured creditor from the time of the seizure. If the sheriff could not take the goods until after the inquisition the results would be absurd; the sheriff must take the jury about the country to the different places where the debtor happened to have goods that they might appraise them.

[JAMES, L.J.:—Evidence might be given of their value.]

There is a regular form given in the books of practice of a warrant by the sheriff to his bailiff to seize the debtor's goods, "So that I may, by reasonable price, cause the same to be de-

(1) Law Rep. 7 Ch. 314, 318. (2) Law Rep. 7 Ch. 325.

livered" to the creditor: *Chitty's* Forms (1). This shews what the practice is, and this practice was followed in the present case. If this were not done the debtor might remove the goods if he had notice of the empanelling of a jury. No notice is given of executing an *elegit: Tidd's* Practice (2). If there be no lands the sheriff need not return an inquisition (3): *Stonehouse* v. *Ewen* (4). As soon as the sheriff had laid his hands on the goods the creditor became a secured creditor within the meaning of sect. 16, and was entitled to the benefit of sect. 12 of the *Bankruptcy Act.* At Common Law a *fi. fa.* took effect from its date, and an *elegit* is much more express in its terms. The *Statute of Frauds* must apply to an *elegit.*

As to sect. 87, it does not apply to an *elegit,* and the Court cannot legislate to make it do so: *Ex parte Villars* (5). It is necessary that the case should come within the very words of the section. In *Ex parte Villars* the sheriff had sold the goods, and had, after the expiration of the fourteen days, handed the proceeds of sale to the execution creditor, who received them without notice of any prior act of bankruptcy, and it was held that he was entitled to retain them as against the trustee in a bankruptcy founded on the seizure and sale under the execution as an act of bankruptcy. Under an *elegit* there never is or could be any sale by virtue of which any proceeds of sale could come into the sheriff's hands. If sect. 87 applies, what would be the duty of the sheriff? Must he hold the goods for fourteen days after the inquisition, or must he wait for fourteen days before he empanels a jury? It may well be that an *elegit* is a *casus omissus* from sect. 87, but the creditor is entitled to escape from its provisions if he can. In *Ex parte Rayner* (6), if the sheriff had gone on to sell the goods, he would have had to pay over the proceeds of sale to the trustee, and therefore the sale would have been a mere idle form, and the trustee might just as well have the goods themselves.

Moreover, the delivery of the goods is a protected transaction, within sect. 95 (sub-sect. 3), for the creditor had no notice of any

(1) 10th Ed. p. 361.
(2) 9th Ed. p. 1036.
(3) Ibid. 1036.
(4) 2 Str. 874.
(5) Law Rep. 9 Ch. 432.
(6) Ibid. 7 Ch. 325.

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act of bankruptcy. The notice must be of an act of bankruptcy prior to the seizure: *Ex parte Schulte* (1).

De Gex, in reply:—

The *Statute of Frauds* has no effect; its provisions are only negative. There is no statutory enactment that an *elegit* shall bind either lands or goods before the inquisition. The sheriff cannot by his direction to his own officer enlarge his own powers.

[COTTON, L.J.:—There are no express words in the *Statute of Westminster the Second* as to when the seizure is to be made. But we find that the practice has been to issue the warrant in a form which directs the seizure to be made first. *Blackstone* does not appear to think that a seizure could not be made before the inquisition: *Blackstone's* Commentaries (2).]

If there are any goods they must be delivered under the *elegit* before the lands are extended, but in practice an *elegit* is never used unless the debtor's goods are insufficient to satisfy the debt; the practice has always been to seize the goods under a *fi. fa.* If the sheriff's possession was unlawful it cannot be extended by construction of law beyond his actual physical possession: *Ex parte Fletcher* (3). After the inquisition the debtor is entitled to get the goods back on paying the debt. It is clear from *Dalton's* Office and Authoritie of Sherifs (4) that there cannot be any delivery but of that which has been appraised by a jury. And in *Chitty's* Forms (5) the "proceedings on the *elegit* before holding the inquisition" are stated, but nothing is said about seizing before inquisition.

[JAMES, L.J.:—The sheriff might run great risk by seizing before the inquisition, for the jury might find that some of the goods seized were not the debtor's.]

The cases cited from *Strange* and *Saunders* do not help the Respondent. *Ex parte Rayner* (6) is not affected by *Ex parte Villars* (7). *Ex parte Rayner* did not come literally within sect. 87. Sect. 95 does not apply.

(1) Law Rep. 9 Ch. 409.
(2) Ed. 1768, book 3, p. 418.
(3) 5 Ch. D. 809.
(4) Page 56.
(5) 11th Ed. p. 405.
(6) Law Rep. 7 Ch. 325.
(7) Law Rep. 9 Ch. 432.

July 29. JAMES, L.J.:—

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Notwithstanding the very ingenious and very elaborate argument of Mr. *De Gex*, we find it impossible to dissent from the conclusion of the Chief Judge. The main point, and indeed the only real point, made by Mr. *De Gex* was, that the seizure of the goods by the sheriff was not warranted by the writ of *elegit*, that the sheriff had no right to take possession of the goods until after they had been appraised by the jury. But there is a well-known form of warrant by the sheriff to his bailiff which is to be found in all the books of practice, and which has been adopted in the sheriffs' offices, directing the sheriff's officer to begin by seizing the debtor's goods, just in the same way as under a writ of *fi. fa.* We have made inquiries, and we find that, though writs of *elegit* in relation to goods and chattels are not in common use, and in fact are nearly obsolete, yet they are occasionally used even in the city of *London*, and that under them the sheriff's officer is always directed to seize and does seize the debtor's goods just as he does under a writ of *fi. fa.*, and the goods are afterwards delivered to the creditor by the appraisement of a jury. The sheriff retains the goods in his possession until he delivers them to the creditor. This is the established practice, and we cannot therefore say that the sheriff was wrong, that he did not do his duty in seizing the goods. He was then, before the filing of the petition, in possession by his officer of the goods for the creditor to the same extent exactly as he would have been under a *fi. fa.*, and it is impossible for us to say that the creditor was not a secured creditor just as he would have been if the sheriff had been in possession under a *fi. fa.* And, this being so, sect. 87 does not apply to the case. No doubt the result will be to make sect. 87 something of a laughing-stock, some ingenious lawyer having found out this way of evading it. But an Act of Parliament is always subject to evasion, and there is no moral obligation not to do that which the Act does not prohibit. If we were to extend the section to the present case, we should be, not construing it, but legislating to supply an omission in it. The Legislature happens to be now in session, and it could, in much fewer minutes of time than the argument of this case has occupied, abolish that which appears to me to be an absurd anachronism. We were referred to the case

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of *Ex parte Rayner* (1), where we held that sect. 87 applied to a case in which the sale of goods, which had been seized by the sheriff under a *fi. fa.*, had been intercepted by the filing of a liquidation petition by the debtor. But what we held in that case was this—that, inasmuch as if a sale had been made the proceeds of it would have belonged to the debtor's estate, the trustee, who would have been the beneficial owner of the proceeds of sale, was entitled to the goods themselves. But in the present case there was not any process by which the trustee could become entitled to any proceeds of sale.

BRETT, L.J., and COTTON, L.J., concurred.

De Gex asked for leave to appeal to the House of Lords.

JAMES, L.J. :—

The question is one of importance, and I cannot say that I think it is entirely free from doubt. We will allow you to appeal. This proceeding against goods and chattels by way of *elegit* is such an absurd anachronism that I hope it will be abolished by the Legislature long before the appeal is heard.

Solicitors for Appellant: *Shaw & Tremellen*, agents for *J. H. Tattersall, Blackburn.*

Solicitors for Respondent: *Scott, Jarmain, & Trass*, agents for *Frank Taylor, Barrow-in-Furness.*

(1) Law Rep. 7 Ch. 325.

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Act of Bankruptcy—Debtor's Summons—Neglect to pay—Payment prevented by act of Creditor—Bankruptcy Petition by Creditor before Expiration of Time limited by Summons—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 6, *sub-s.* 6.

After the service of a debtor's summons, and before the expiration of the time limited for payment of the debt, the summoning creditor presented a bankruptcy petition against the debtor, founded on the same debt, but on an alleged prior act of bankruptcy. The debt was not paid within the time limited, and the creditor then presented a second petition founded on the alleged neglect of the debtor to pay the debt according to the requirements of the summons:—

Held, that the mere fact of the pendency of the first petition was not a sufficient reason for saying that the debtor had been prevented from paying the debt by the act of the petitioning creditor, and that, therefore, there had been no neglect to pay and no act of bankruptcy; but that to resist adjudication on the second petition the debtor must prove as a matter of fact that the pendency of the first petition had prevented him from paying the debt.

Ex parte Musgrove (1) considered.

ON the 17th of April, 1880, *Kirk Brothers & Co.* issued a debtor's summons out of the *Newcastle-on-Tyne* County Court against *Joseph Greener*, a non-trader, claiming payment of a judgment debt of £620 14*s*, and the same day the summons was served upon him. On the 3rd of May, before the expiration of the twenty-one days limited by the summons for the payment of the debt, *Kirk Brothers & Co.* presented a bankruptcy petition in the County Court against *Greener* in respect of the same debt, but alleging that he had committed an act of bankruptcy on the 5th of November, 1879, by making a fraudulent conveyance of his property or of some part thereof. The 21st of May was appointed for the hearing of the petition. *Greener* did not pay the alleged debt within the twenty-one days, and on the 12th of May *Kirk Brothers & Co.* presented a second bankruptcy petition against him founded on the same debt, and alleging that he had committed an act of bankruptcy by neglecting to comply with the debtor's summons. The 21st of May was appointed for the

(1) 3 M. D. & D. 386.

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hearing of this petition also. On presenting this petition the petitioners' solicitors applied to the Registrar to consolidate the two petitions, but he refused to do so, and adjourned the application to be heard by the Judge on the hearing of the petitions. On the 21st of May the two petitions came on for hearing by the Judge, and the application to consolidate them was renewed. The Judge held that he had no power to consolidate under sub-sect. 2 of sect. 80 of the *Bankruptcy Act*, 1869, the two petitions being presented by the same creditors for the same debt, but he held that the petitioning creditors must elect which petition they would proceed upon, as he was of opinion that they could not proceed upon both. Their counsel then elected to proceed upon the petition of the 12th of May, and an order was made dismissing the petition of the 3rd of May. The hearing of the petition of the 12th of May was then opened, and the objection was taken that, inasmuch as the petition of the 3rd of May had been presented before the expiration of the twenty-one days from the service of the debtor's summons, and it alleged the commission by the debtor of a prior act of bankruptcy, the petitioning creditors had themselves by their own act rendered it impossible for the debtor to pay the debt, and that they could not therefore rely upon the non-payment within the twenty-one days as an act of bankruptcy. The Judge held that this was a fatal objection, and on this ground he made an order dismissing the second petition. *Kirk Brothers & Co.* appealed to the Chief Judge. The appeal was heard on the 21st of June, 1880.

De Gex, Q.C., and *Henry*, for the Appellants, referred to *Ex parte Musgrove* (1), which they said was distinguishable, and to *Ex parte Boss* (2).

Winslow, Q.C., and *Creed*, for the debtor, urged that *Ex parte Musgrove* was exactly in point, and referred also to *Ex parte Carter* (3), and to *Bankruptcy Act*, 1869, ss. 13, 80, 86.

BACON, C.J. :—

I cannot in these proceedings, consistently with justice, or reason, or common sense, or with the statute, hold the petition to

(1) 3 M. D. & D. 386. (2) Law Rep. 18 Eq. 375.
(3) 2 Ch. D. 806.

be bad. A petition was presented to make this man a bankrupt; and the only reason suggested against it is, that it is doubtful whether the creditor had not a better mode of proceeding, namely, by service of a debtor's summons. The petition was to be heard by the learned Judge. And then there was a second petition, and it has been said that, as there were two applications in bankruptcy, they might have been consolidated. But consolidation could not take place, because the first petition was withdrawn by consent. There was an available act of bankruptcy alleged under each petition, and, with the sanction of the learned Judge and his approbation, the first petition was withdrawn, and there remain only the proceedings on the debtor's summons, and on this second petition the order appealed from was made.

The time had elapsed during which the debtor (if he was advised, as he now says he was advised, that he could not lawfully pay the money) might have applied to have that summons dismissed. He took no such step, and when he was examined, as I understand, he said that on an execution for a considerable sum of money being put into his house he was wholly unable to pay the debt; and he further says he was advised that it would be illegal to pay it. In my opinion there would have been no illegality whatsoever in his paying it. He was perfectly at liberty to pay it, and if he had paid it he might have applied to have the summons dismissed. It is suggested that the first petition was then pending, and reference was made to a case in which it is quite clear that the creditor kept out of the way to avoid the receipt of the money which the debtor himself was willing to pay. But in this case, beyond all doubt, the debtor, if in earnest, could easily have removed any impediment that stood in the way, preventing the commission of a second act of bankruptcy, and asking the Court to discharge the order, and the question would be before the Court. In this case the Court induces the petitioning creditor to withdraw his petition, and from that time it must be treated as non-existing. There remained, therefore, nothing for the Court to adjudicate upon but the debtor's summons and the proceedings upon that summons; and from the fact that the debtor submitted, without raising any question upon the debtor's summons, I think he ought properly to be adjudicated a bankrupt.

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From this decision the debtor appealed. The appeal was heard on the 29th of July.

Winslow, Q.C., and *Creed*, for the Appellant :—

The presentation of the bankruptcy petition on the 3rd of May, before the expiration of the twenty-one days limited for complying with the debtor's summons, necessarily prevented the Appellant from dealing with his property, and therefore he could not comply with the summons. The effect of the presentation of a bankruptcy petition is to lock up all the debtor's available assets if he is an honest man: *Bankruptcy Act*, 1869, ss. 13, 80, sub-s. 4; Bankruptcy Rules, 1870, r. 33; *Ex parte Carter* (1). The difficulty was caused by the summoning creditors' own act, and therefore they cannot make use of the non-compliance with the summons as an act of bankruptcy. If the creditor takes any step which prevents, or imposes a legal difficulty in the way of the debtor's complying with the summons, he will not be able to avail himself of the omission to pay as an act of bankruptcy: *Ex parte Musgrove* (2); *Ex parte Payne* (3); *Ex parte Gratton* (4); *Robson's* Bankruptcy (5). It has been suggested that the decision in *Ex parte Musgrove* was founded on sect. 8 of 6 Geo. 4, c. 16, which is now repealed, but that is not so. The summoning creditors have themselves placed a difficulty in the way of the payment of the debt claimed by the summons.

[BRETT, L.J. :—The two petitions might have related to two distinct debts.]

That would have been a totally different case; the two petitions are in fact founded on the same debt. If the debtor had drawn a cheque on his bankers to pay the debt, the bankers might, if it turned out that the alleged prior act of bankruptcy had been committed, have had to pay the money over again. The debtor could not deal with his property while the petition was pending; no one would lend him any money.

[JAMES, L.J. :—All the inconveniences you suggest would

(1) 2 Ch. D. 806.
(2) 3 M. D. & D. 386.
(3) De G. 534.
(4) 2 M. D. & D. 401.
(5) 3rd Ed. p. 157.

equally arise if the first petition had been presented by another creditor.]

But here the difficulty is caused by the summoning creditors themselves.

[COTTON, L.J.:—It may perhaps be put in this way, that the summoning creditor has done an act which is inconsistent with his remedy by debtor's summons.]

That is so. The creditors are saying in the one proceeding, Pay us a sum of money which you owe us, and in the other, Distribute your property equally among all your creditors. A debtor might not honestly know in all cases whether he had committed an act of bankruptcy; it might depend upon a difficult question of the construction of a deed.

The Chief Judge was of opinion that an application ought to have been made to dismiss the summons. But any objection to the summons may equally well be taken on the hearing of the petition: *Bankruptcy Act*, 1869, s. 8. And indeed an application to dismiss a debtor's summons can only be made upon one of the grounds mentioned in sect. 7 of the Act: *Ex parte Ellis* (1).

The presentation of the first petition may be treated as an election to abandon the debtor's summons. The creditors after they had presented one petition were not entitled, without the leave of the Court, to present a second petition in respect of the same debt.

[JAMES, L.J.:—The County Court Judge required them to elect on which petition they would proceed.]

There ought to be the greatest strictness in bankruptcy proceedings, for under them certain acts are made criminal which would not otherwise be so.

[JAMES, L.J.:—After the first petition was dismissed on the election of the Petitioners, what was there then to prevent the debtor from paying the debt? The Judge might have adjourned the hearing of the other petition for a week.]

The twenty-one days had then expired, and the creditors were entitled to insist on an adjudication, if they could avail themselves

(1) Law Rep. 6 Ch. 602.

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of the act of bankruptcy: *Ex parte Boss* (1); *Ex parte Brigstocke* (2).

JAMES, L.J.:—

I think that the case ought to go back to the County Court Judge with the expression of our opinion that, if the debtor can satisfy him as a matter of fact that, but for the embarrassment caused to him by the presentation of the first petition, he would have paid the debt, no adjudication ought to be made. If that be so, it would be inequitable to make an adjudication.

De Gex, Q.C., and *Henry*, for the petitioning creditors, assented to this.

JAMES, L.J.:—

In my opinion we cannot interfere with the decision of the Chief Judge. It is quite clear that an act of bankruptcy has been committed, unless it can be shewn that the omission to pay the debt was the result of the proceedings of the petitioning creditors themselves. If it was not, I cannot see what ground there is for preventing the act of bankruptcy from having its legal effect. The creditor has a right to present a petition, and sect. 8 of the Act says that the Court, if satisfied with the proof of the debt of the petitioning creditor, the trading (if necessary), and of the act of bankruptcy, shall adjudge the debtor to be bankrupt. The petition must go back to the County Court Judge to hear the case on its merits, and he will inquire as a matter of fact whether the omission to pay the debt was due to the pendency of the first petition presented by the petitioning creditors, whether, that is, but for that petition, the debtor could and would have paid the debt.

BRETT, L.J.:—

I am of the same opinion. I cannot agree that the mere fact of the presentation of the first petition is of itself enough to prevent the non-payment of the debt from being an act of bank-

(1) Law Rep. 18 Eq. 375. (2) 4 Ch. D. 348.

ruptcy. It is said that the existence of the first petition might have prevented the debtor from paying the debt. It appears to me that that is not sufficient. If it can be shewn that the pendency of the first petition did in fact prevent the debtor from paying the debt according to the exigency of the debtor's summons, I think it is immaterial to consider whether the omission would not be a neglect to pay within the very words of sect. 6, or only by an equitable construction of them. But it lies upon the debtor to shew that the presentation of the first petition did in fact prevent him from obeying the summons. If it did, I should think that no act of bankruptcy had been committed upon which an adjudication ought to be made. This appears to me to be quite consistent with the careful way in which the cases on the subject have been abstracted by Mr. *Robson*. He says, for instance (*Robson's* Bankruptcy (1)), with reference to *Ex parte Gratton* (2), "If the creditor keeps out of the way during the time allowed for payment of the debt, so that the debtor, being ready and willing, is unable to pay it, an act of bankruptcy will not be committed." And with reference to *Ex parte Musgrove* (3) he says, "And the same consequences will follow if the creditor takes any step which prevents or imposes a legal difficulty in the way of the debtor's complying with the summons," that is, as I take him to mean, which in fact prevents the debtor from complying with the summons. These authorities are consistent with our ruling.

COTTON, L.J.:—

I think that the case ought to go back to the County Court Judge, for we are not in a position to say whether an act of bankruptcy has been committed. The question is whether, upon the fair construction of the words, an act of bankruptcy has been committed within the meaning of sub-sect. 6 of sect. 6 of the Act, whether the debtor has neglected to pay the debt. The petitioning creditors within the twenty-one days presented a bankruptcy petition against him founded upon an alleged prior act of bankruptcy. In my opinion if there had been a tender of the money

(1) 3rd Ed. p. 157. (2) 2 M. D. & D. 401.
(3) 3 M. D. & D. 386.

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by the debtor within the twenty-one days it could not have been said that there had been any neglect by him to pay, and in the same way, if the petition did prevent him from paying the debt there would not be any act of bankruptcy. But if he had no means of paying, then, in my opinion, it could not be said that the petition prevented him from paying. I do not see how any case could have been made for the dismissal of the debtor's summons; such an application can only be made upon one of the grounds mentioned in sect. 7 of the Act, *i.e.*, on the ground that the respondent is not indebted to the creditor serving the summons, or that he is not indebted to the amount of £50. Possibly there might have been ground for an application to stay the proceedings.

JAMES, L.J.:—

Or for an application to the Court under its general jurisdiction to prevent an abuse of its procedure. The costs of the appeal will be reserved until the case has been disposed of by the County Court Judge.

Solicitors for Appellant: *Nash & Field*, agents for *Hoyle, Shipley, & Hoyle, Newcastle-on-Tyne.*

Solicitor for Petitioning Creditors: *Robert Wood*, agent for *T. Milburn, Workington.*

In re COLONIAL TRUSTS CORPORATION. *Ex parte* BRADSHAW.

M. R.
1879
Nov. 29.
Dec. 13.

Company — Liquidation — Debentures — Charge on Real and Personal Estate of Company — Uncalled Capital — Right of Proof — Commencement of Winding-up.

A company formed for the purchase and management of land, and which was empowered by articles to borrow money for the purposes of the company provided that the amount borrowed should not at any time exceed the amount of the unpaid subscribed capital, had issued debentures whereby they bound "themselves and their successors and their real and personal estate" for payment of the sums advanced, with a proviso that the holders of the debentures should be entitled to be paid the principal and interest secured to them respectively *pari passu*. The company was in liquidation, a provisional liquidator having been appointed on the petition of the company, and a resolution having been subsequently passed for a voluntary winding-up, which was continued under supervision. On a claim by debenture holders to be entitled to a primary charge on the company's property, including the uncalled capital:—

Held, that the debentures were a charge on the real and personal estate of the company as it existed at the commencement of the winding-up, but not including the then uncalled capital:

Held, also, that the debenture holders, so far as they might be unable to obtain payment in full out of the property comprised in their charge, were at liberty to prove with the other creditors against the general assets:

Held, also, that the winding-up must be taken to have commenced at the date of the appointment of the provisional liquidator.

THIS was an application on behalf of certain debenture holders in the *Colonial Trusts Corporation*, which was in liquidation.

The corporation was registered as a limited company in 1871. The articles of association stated that it was established for the following purposes: "to buy, take on lease, or otherwise acquire land, and manage and improve the same, and to erect, improve, or repair any buildings thereon, and from time to time to sell or dispose of such land and buildings upon such terms and conditions as they think fit;" also "to manage estates, collect and receive rents, and transact any agency or commission business."

By sect. 11 of the articles it was provided that the directors should have, *inter alia*, the following specific powers: "To borrow on behalf of the company such sums of money as they deem

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advisable for any of the objects or purposes of the company, at such rate of interest and generally upon such terms and conditions as they may from time to time think fit, provided that the total principal amount borrowed by the company shall not at any one time exceed the amount of the unpaid subscribed capital without the previous sanction of the company in general meeting."

The directors subsequently issued a prospectus which, so far as material, was as follows: "The directors of this corporation are prepared to grant debentures for loans of sums of £100 and upwards for periods of not less than three years, bearing interest at the rate of 5½ per cent. per annum for three years, and 6 per cent. for five years and upwards. Coupons for interest commencing from the day on which the principal is received by the corporation are attached to the debentures and are made payable at the bankers of the corporation on the 1st of January and the 1st of July, or, if preferred by the lender, on the 1st of April and the 1st of October. The borrowing power of the corporation is strictly limited to the amount of its uncalled capital, and the money thus borrowed will be invested in first mortgages on landed estates and other approved securities in the leading colonies, an ample margin being retained on the value of the estates as previously certified by the corporation's valuer. In addition to these the debenture holder has the security of the assets of the corporation and its uncalled subscribed capital."

The directors accordingly issued debentures in the following orm:—

"Debenture.

"No. . £ .

"*Colonial Trusts Corporation, Limited.*

"The *Colonial Trusts Corporation, Limited*, in consideration of the sum of £ to them in hand paid by are held and firmly bound unto the said in the penal sum of £ sterling English money to be paid to the said executors, administrators, or assigns, for which payment to be well and faithfully made they bind themselves and their successors and their real and personal estate firmly by these presents. Dated, &c.

"The condition of the above written bond is such that if the

corporation shall pay to the said his executors, administrators, or assigns, on the day of 18 the principal sum of £ and also interest for the same until payment at the rate of per cent. per annum, such interest to be payable half-yearly on the day of and the day of in every year at the banking house of Messrs. *Glyn, Mills, Currie, & Company*, No. 67, *Lombard Street*, or other the bankers of the company for the time being on the production and delivery up of the half-yearly coupons attached hereto, then the above written obligation shall be void, but otherwise shall remain in full force and virtue. Provided that the holders of debentures of the corporation shall be entitled to be paid the principal moneys and interest secured to them respectively *pari passu*, and that no debenture shall have any preference above another by reason of priority of date or for any other reason whatever.

"Given under the common seal of the corporation," &c.

A memorandum appended to the debenture set forth the 11th section of the articles before stated.

On the 8th of October, 1878, a petition was presented by the company, and another petition was also presented by creditors, for the winding-up of the company, and on the 9th of October, 1879, a provisional liquidator was appointed. A resolution was subsequently passed for the voluntary winding-up of the company, which was continued under supervision.

Only a portion of the capital of the company had been called up at the time of the liquidation.

The debenture holders now applied to the Court for a declaration that they were entitled to a primary charge on the real and personal estate and property of the corporation, including the uncalled capital.

Davey, Q.C., and *Everitt*, for the applicants.

Chitty, Q.C., and *Whitehorne*, for the liquidators.

The case of *Ex parte Moor* (1) was referred to.

(1) 10 Ch. D. 530.

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JESSEL, M.R.:—

I have no doubt that this document was intended to be a charge upon the property of the company of some kind. If it were well drawn there would be nothing to discuss. The form of the debenture is this: it first binds the company with the penal sum mentioned in the bond, and then it binds the company and their successors and their real and personal estate.

Retaining, as I do, my former opinion, that those words will not do, I much regret to find that Lord Justice *James* thought they would do; and, therefore, if I may say so, admitting that, with a context, they will do, of course I should be satisfied with a slighter context if some other Judge entertained the opinion that they would do without any context at all. To that extent I must say my opinion is modified with reference to that of the Lord Justice.

Now, there is a context here which it is hopeless to explain, except by the theory that there is a charge. The condition of the bond contains the following proviso: "Provided that the holders of debentures of the corporation shall be entitled to be paid the principal moneys and interest secured to them respectively *pari passu*, and that no debenture shall have any preference above another by reason of priority of date or for any other reason whatever."

If this is a floating security, and the debenture holders can stop the company when they see it is going wrong and get a receiver appointed, that would have an effect; because the one that stops the company would only stop it for the benefit of himself and all others who hold debentures. But, if it has not that meaning, it can only apply to the case of a winding-up; in which case the law prevents any priority, and the clause has no meaning whatever; and the Respondents are driven to argue that it had no meaning whatever, that it was simply pleonastic, that it was a conveyancer's phrase, that it was intended to have no meaning, that it was put in as having no meaning, and that it would have no meaning. That, however, would be contrary to the first rules of construction. I am bound to say I think it was not put in with a view to a winding-up; it shews, therefore, that the debenture holders have a security upon the property, which, as between themselves, is without priority; and I also say that it was decided

in the case of *Ex parte Moor* (1), although it was not necessary to decide the point, that it is what is called "a floating security." To adopt the expression of Lord Justice *James* (2), it is "a charge upon the assets for the time being," leaving the company to deal with them as they think fit till they are stopped either by a receiver or a winding-up. What those assets consist of is another question, which I must hear you argue.

Davey, Q.C., and *Everitt*, for the applicants:—

We contend, first, that these debentures were a floating charge upon the real and personal estate of the company for the time being, and, therefore, upon the real and personal estate as it existed at the time of the winding-up; secondly, that under the special circumstances of this case they were a charge upon the unpaid capital of the company at the time of the winding-up.

[JESSEL, M.R.:—On the first point I do not wish to hear you. I will hear Mr. *Chitty* upon it presently.]

There can be no doubt that the company had power to charge their unpaid capital. These debentures, being a charge upon the personal estate of the company, were a charge upon the assets, and therefore upon the unpaid capital, for as soon as the liquidation begins the unpaid capital becomes part of the assets. It is treated as assets in sect. 38 of the *Companies Act*.

In this case the prospectus announcing the issue of these debentures states that "the borrowing power of the corporation is strictly limited to the amount of its uncalled subscribed capital;" also "that the debenture holder has the security of the assets of the corporation and its uncalled subscribed capital." The wording of this prospectus would lead any one applying for debentures to believe that he would have a charge upon the unpaid capital.

[His Lordship then called upon the counsel for the liquidators to address him upon the first point.]

Chitty, Q.C., and *Whitehorne*, for the liquidators:—

These debentures purport to bind "the real and personal estate" of the company, but there is nothing to shew at what time the

(1) 10 Ch. D. 530. (2) 10 Ch. D. 547.

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real and personal estate is to be charged, nor are there any words enabling the company to carry on its business in the meantime. The words can only be understood as referring to the estate as existing at the time when the debentures were issued. The case is distinguishable from that of *In re Marine Mansions Company* (1), for there the form of debenture was different, as the company charged "the undertaking, property, receipts and revenues," and also pledged "the property belonging to us for the time being during the subsistence of the debenture." There are no such words in these debentures.

[The case of *In re Hamilton's Windsor Ironworks* (2) was also referred to.]

JESSEL, M.R.:—

It appears to me that both the points I have to decide are really covered by authority. If they are not so covered I think they are very plain.

I will first consider whether the real and personal estate of the company for the time being, which is that possessed by the company at the time when a receiver is appointed or a winding-up commences, includes capital which is not then called, in other words, whether it includes that which is not a debt due to the company, but a liability to contribute on the part of its members.

As far as I know, independently of authority, no one would treat the word, "property" or the word "estate" which is used here, when applied to a partnership, as including the liability of the individual partners to make good a deficiency of that very estate to pay the creditors in full. It is a totally different thing. When we speak of the property of a partnership or the estate and effects of a partnership we speak of that which belongs to the firm. If it happens to be deficient there is a personal liability in each of the partners, according to the English law, to contribute to the extent of his whole fortune to make up the deficiency, but that liability cannot in any proper sense of the term be treated as the estate or the real and personal estate of the firm. It does not belong to the firm though the creditors of the firm may compel the partners to pay by suing them.

(1) Law Rep. 4 Eq. 601. (2) 12 Ch. D. 707.

There is no distinction in this respect between an ordinary common law partnership and an incorporated trading company. The fact is the property of a corporation does not include the liability of its members to contribute. Take a municipal corporation: when we talk of the property of a corporation nobody would dream of including in it the liability of all the ratepayers to pay rates. Of course if the rates had been made and the debt constituted it might be the case sometimes, but not always, that that debt might be the property of the corporation; but the possibility of making the corporators pay sums of money to the corporation to meet their debts is not a portion of the estate and effects of the corporation.

If there were no decision, there really would not, in my opinion, be any ground whatever for saying that the power which the corporation possessed of making the individual contribute was the property or estate or effects of the corporation. Nor does it make any difference that the power is limited. In the ordinary common law partnership the whole property of every individual partner is liable for the debts of the partnership. In the case of a limited partnership, whether it is limited merely by common law, as it is sometimes, of which the *Bank of England* and Indian Banks are very good examples, or whether it is limited by the provisions of the *Companies Act*, that only is limited which was previously unlimited; but the nature of the contribution is not altered.

Then the *Companies Act* was referred to. But that Act most carefully distinguishes, as it appears to me, between the property of the company and the liability to contribute to the assets of the company. The 38th section of the Act says that "in the event of a company formed under this Act being wound up" (this company has been wound up, and therefore the only way of getting these calls is under this provision), "every past and present member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company." When he has paid it, of course it becomes assets, but the liability is correctly described as a liability to contribute, for that is exactly what it is. Therefore at the date of the commencement of the winding-up it was not part of

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the assets of the company and would not pass under these words. I may say that all the cases are to the same effect.

The second point that was argued was this—What is the nature of the floating security? Now, as has been already pointed out both by the Lord Justice *James* and myself in the case of *Ex parte Moor* (1), it would be a monstrous thing to hold that the floating security prevented the making of specific charges or specific alienations of property, because it would destroy the very object for which the money was borrowed, namely, the carrying on of the business of the company, and I may refer, as regards this company, to the following clause of the articles: "To buy, take on lease, or otherwise acquire land, and manage and improve the same, and to erect, improve, or repair, any buildings thereon, and from time to time to settle or dispose of such land and buildings upon such terms and conditions as they think fit." It is obvious that they could not sell the land and make a title to it if there was this charge upon it which prevented their doing anything at all. Then it proceeds thus: "To manage estates, collect, and receive rents, and transact any agency or commission business." The fact is, the only way of making the thing workable is to treat it (as I understand was decided in the case referred to) as what is sometimes called a floating mortgage or charge attaching on the property of the company in preference to its general liabilities, that is, its liabilities to creditors not secured by specific charge, at the moment the business is put an end to, either by the appointment of a receiver in an action instituted by the debenture holders against the company, or at the commencement of the winding-up where the company is wound up, either by voluntary winding-up or under the compulsory power of winding-up by the Court.

The question then arose as to what was the commencement of the winding-up in this case, having regard to the fact that, on the 8th of October, 1878, a winding-up petition was presented, on the 9th of October, 1878, a provisional liquidator was appointed, and on the 18th of October, 1878, a resolution was passed for the

(1) 10 Ch. D. 530.

voluntary winding-up of the company, which was continued under the supervision of the Court.

Davey, Q.C.:—

The question as to the commencement of the winding-up was considered in *Hodgkinson* v. *Kelly* (1) and *Ex parte Colborne and Strawbridge* (2), but the only case in which it has been dealt with by the Court of Appeal is *Weston's Case* (3). There Lord Justice *Wood* observed: "Where there is a petition for winding-up and nothing more done, and then resolutions passed for a voluntary winding-up, and afterwards an order made upon the petition so presented for continuing the winding-up under the supervision of the Court, inasmuch as the order is to continue the winding-up, it must be understood to be the winding-up which commenced at the date of the second resolution, and that it cannot be dated back to the presentation of the petition, because the thing which has to be continued had no existence at that date." In the present case the provisional liquidator was appointed before the passing of the resolution, namely, on the 9th of October, 1878.

JESSEL, M.R.:—

That seems to be the right date. It was then that the company ceased to carry on its business. If the appointment of a receiver in an action by a debenture holder is a sufficient stoppage of the business for the purpose of enabling the debenture holder to assert his right, *à fortiori* it must be so when on the petition of the company a liquidator is appointed.

The order will be that the debentures are a charge on the real and personal property of the company as it existed at the date of the commencement of the winding-up, namely, the 9th of October, 1880; with a declaration that such real and personal estate does not include the then uncalled capital, and an inquiry as to what the real and personal estate consisted of at the date of the commencement of the winding-up: the costs of the debenture holders appearing on the application to be taken out of the general mortgaged property. If the mortgaged property should be insufficient

(1) Law Rep. 6 Eq. 496. (2) Law Rep. 11 Eq. 478.
(3) Law Rep. 4 Ch. 29, 25.

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to enable the debenture holders to obtain payment in full out of the property comprised in their charge, they are to be at liberty to prove for the balance of their debt, together with the general creditors, against the assets of the company.

Solicitors for Applicants: *Crosse, Sons, & Riley.*
Solicitors for Liquidators: *Tilleard, Godden, & Holme.*

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VAVASSEUR *v.* KRUPP.

[1877 V. 50.]

Practice—Discontinuance of Action—Counter-claim.

A counter-claim is part of the original action, and, when the action has been discontinued, no further step can be taken in the counter-claim.

IN this case (which is reported (1)) the Plaintiff had delivered his statement of claim in the action, and as one of the Defendants, the Mikado of *Japan*, had put in his statement of defence and a counter-claim. The time for replying to the counter-claim having expired, the Plaintiff by notice in writing discontinued the action, under Rules of Court, 1875, Order XXIII.

The Defendant, the Mikado, now moved under Order XL., rule 2, and Order XXIX., rule 12, of the Rules of Court, 1875, for such order as upon his counter-claim he was entitled to.

Fooks, Q.C., and *Cozens-Hardy*, for the motion.

Davey, Q.C., and *Everitt*, for the Plaintiff.

JESSEL, M.R.:—

Looking at the words of the rule in Rules of Court, 1875, Order XIX., rule 3, it is plain that the counter-claim is part of the original action. When the original action is discontinued the counter-claim is gone too, and the counter-claimant can only assert his rights in a fresh action. The meaning of the *Judicature Act*, 1873, s. 24, sub-ss. 2, 3, is that a defendant may by a cross action

(1) 9 Ch. D. 351.

cut down the plaintiff's claim. It appears to me that there is no foundation for the statement that a counter-claim is an independent action, and therefore no step can be taken by the Defendant on this counter-claim.

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Solicitors: *Wilson, Bristows, & Carpmael; Harrison, Beal, & Harrison.*

PIERCY *v.* YOUNG.

M. R. 1880 Feb. 6.

[1879 P. 217.]

Practice—Counter-claim—New Issue—Application by Defendant for Separate Trial of Issues—Rules of Court, 1875, *Order* XXXVI. *r.* 6.

An application to have one issue in an action tried before another can only be granted on very special grounds.

Where a Defendant in a partnership action set up by counter-claim an agreement by the Plaintiff for sale to the Defendant of his (the Plaintiff's) interest in the partnership at a stated price:—

Held, that the Defendant was not entitled under Rules of Court, 1875, Order XXXVI. rule 6, to have the issue raised by his counter-claim tried before the Plaintiff's issues in the action.

Emma Silver Mining Company v. *Grant* (1) explained in reference to the exceptional cases in which the Court will accede to applications under Order XXXVI. rule 6.

BY an agreement dated the 15th of May, 1873, and made between *Thomas Docwra, Gaetano Semenza,* and *G. W. Morris,* it was agreed that a partnership should be formed between *Docwra, Semenza, Morris,* and a fourth person to be nominated by *Semenza,* for the purpose (*inter alia*) of carrying out contracts made by *Semenza* with the *Royal Sardinian Railway Company* for the construction of a line of railway.

The terms of the agreement were that the line contracted for with the company should be constructed by *Docwra, Morris,* and the nominee of *Semenza,* and that *Semenza* should supply the money for the expenses not exceeding 5,325,000 Italian lire, and that, on the completion of the contract, the difference between that sum and the sums actually expended should be equally divided between the four partners.

(1) 11 Ch. D. 918.

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By a memorandum of even date with the agreement, the Plaintiff *B. Piercy* was nominated by *Semenza* as the fourth partner.

Before the completion of the line of railway, *Semenza* was in pecuniary difficulties, and in November, 1873, he filed a petition for liquidation under the *Bankruptcy Act*, and the Defendant *J. Young* was appointed trustee in the liquidation.

By an arrangement under the liquidation the contracts with the railway company were adopted and duly carried out by the Defendant and a committee of inspection of which the Plaintiff was a member, and the adventure eventually proved profitable and beneficial.

In July, 1879, the Plaintiff commenced his action against the Defendant, and in his statement of claim alleged that in February, 1878, the Defendant had purchased, on behalf of himself and the Plaintiff, *Docwra's* share of the partnership for £13,000, and that in April, 1878, he had also purchased, on behalf of himself and the Plaintiff, *Morris's* share for £7228, and that the Defendant had also purchased, on behalf of himself and the Plaintiff, the interests of other persons in the adventure. The Plaintiff claimed an account of the partnership dealings, and damages for breach of contract and non-performance of the partnership articles, together with large sums for personal services.

The Defendant, in his statement of defence, alleged that he had purchased the respective interests mentioned in the statement of claim on account of *Semenza's* estate and not for the benefit of the partnership, and he also alleged that the Plaintiff had stated and settled an account with the Defendant in respect of the Plaintiff's share of profits arising out of the partnership for the sum of £5000, and that the Plaintiff had agreed to sell for £5000 his own share and interest in the partnership to the Defendant as trustee for *Semenza's* estate. The Defendant also counter-claimed for moneys advanced, and pleaded set-off.

On the 4th of September, 1879, a motion by the Defendant, seeking to enforce an arbitration clause contained in the partnership agreement, was heard by Mr. Justice *Stephen* sitting as Vacation Judge, and an order was made staying all proceedings in the action and referring the questions in the action to arbitra-

tion. On the 17th of December, 1879, the Appeal Court rescinded the order of Mr. Justice *Stephen* on the ground that the matters in dispute were not within the arbitration clause (1).

The Defendant now moved, under Rules of Court, 1875, Order XXXVI, rule 6, that the issue whether, as he alleged and the Plaintiff denied, the Plaintiff had agreed to sell to the Defendant all his share and interest in the partnership, might be tried before the other issues in the action, and that the trial of such issue might be expedited in such manner as the Court should think fit.

According to the Plaintiff's affidavit, the sale had been made by a verbal agreement made in *Italy*. This was denied by the Defendant's affidavit. The Plaintiff had delivered interrogatories which had not been answered by the Defendant, and had not yet delivered his reply, but had obtained an order for further time.

Davey, Q.C., and *H. B. Buckley*, for the Defendant :—

This application is within the cases put by your Lordship in *Emma Silver Mining Company* v. *Grant* (2), for if the issue raised by the Defendant is successful and the agreement is established no further question will remain to be tried between the parties, and both time and expense will have been saved.

The agreement rests entirely on verbal evidence, and it is of importance that the matter should be determined as soon as possible whilst witnesses are living and memories fresh.

Roxburgh, Q.C., and *Romer*, for the Plaintiff:—

There is nothing which entitles the Defendant to deprive the Plaintiff of the conduct of the action. Moreover, the Defendant's motion is premature; no reply has been delivered by the Plaintiff and issue is not joined. Nor has the Defendant yet answered the Plaintiff's interrogatories, which are most material to this particular issue.

JESSEL, M.R.:—

The rule in question, I think, never was intended to enable the Defendant to take the conduct of a cause away from the Plaintiff.

(1) 14 Ch. D. 200. (2) 11 Ch. D. 918.

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It was intended to be applied to the class of cases which I have mentioned in my judgment in the case of *Emma Silver Mining Company* v. *Grant* (1), which I may call exceptional cases.

Now, what are the issues to be tried here? There is, first of all, an issue whether the Plaintiff has sold by verbal contract his share of the partnership to the Defendant. The Plaintiff denies it. As to trying such a case on affidavit it is impossible, but all I will say about it is this, I am not satisfied upon the present evidence that he ever entered into such a contract. I may be satisfied hereafter. I am not satisfied at present, and I am not enabled to come to a conclusion as to the probability of the case being established at all.

The second issue to be tried is whether some other contract made for the purchase of other partners' shares was made for the sole benefit of the person buying them, or for the joint benefit of the partners.

Those are the only two issues absolutely necessary to be tried. There is a third issue which will probably be tried, and that is whether there has been any breach of the partnership articles which will entitle the Plaintiff to an inquiry as to damages and as to taking the partnership accounts. I do not want to say too much about this issue at present because I cannot think that much will come of it. Therefore, in substance there will be only two issues to be tried with the possibility of a third.

Now, why should I try one issue before the other at the request of the Defendant and against the wish of the Plaintiff? The issue which the Defendant asks me to try he has chosen himself to raise in the counter-claim. He might, if he had thought fit, have brought his action for specific performance. It was entirely his election to make his claim an issue in the action. It was not the Plaintiff's issue in the action, and it is not the substantial issue in the action, and as the Defendant has chosen to raise this issue by his counter-claim he must be considered to have so acted for no other reason than because, according to the provisions of the *Judicature Act* and the rules thereunder, it is desirable that all questions at issue between the Plaintiff and the Defendant shall be tried at the same time. He has actually availed himself of

(1) 11 Ch. D. 918.

those rules to get this issue tried at the same time as the Plaintiff's issue, and now he comes here with a motion that it shall be tried separately. It is the most singular mode of conducting a case that can be imagined. It appears to me that he has by his own election made it a part of the action, and that he is seeking now to change his course without any good reason except one which I can imagine from the circumstances of the previous motion.

That being so, it is plain to my mind this is not a case which was contemplated by the Rules, and the Defendant has only himself to thank for this issue being mingled up and having to be tried at the same time with another issue or other issues. The object of the *Judicature Act* was to try all disputes together, and it was considered a beneficial object. Separate trials of separate issues are nearly as expensive as separate actions, and ought certainly not to be encouraged, and they should only be granted on special grounds. Consider for a moment three illustrations I gave in *Emma Silver Mining Company* v. *Grant* (1), when I directed an issue to be tried. The first case was that of a lady who alleged that she was the legitimate child of somebody, and as such entitled to an account, but her legitimacy was denied. If the Plaintiff was legitimate, her right to an account was not contested, but the cost of taking the account would have been enormous, so that if I had directed the account in the first instance and decided the legitimacy afterwards, the whole costs would have been thrown away. Therefore it was essential to decide the question of legitimacy first. It was not a case really for directing an issue for the trial as distinguished from trying the action. If the case had come on in the regular way, the only question to be tried would have been legitimacy. It was expediting the trial on the only question that could be tried.

The two next cases were very peculiar. The one was an heir-at-law case, in which the Plaintiff was a pauper with a fishing action, a very special case indeed, and there was evidence—strong evidence, and it turned out to be satisfactory evidence—that the Plaintiff had no claim at all. I have no such evidence here. As I said before, I cannot tell by the affidavits who is right and who is wrong. There is a statement by one side met by a con-

(1) 11 Ch. D. 918.

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tradictory statement on the other side. One cannot say in this case that there is *primâ facie* evidence that the Defendant is right upon the issue, as there was in that case.

The third case was still more remarkable, because it was not only a pauper plaintiff, but a pauper set up by other persons to sue on his and their behalf, and in that case no doubt it would have been an enormously expensive action to try. The simple question was whether he was a tenant of the manor or not. The Defendants produced the court rolls, and shewed that his name was not entered as tenant. There was the strongest *primâ facie* evidence that he was not tenant; I therefore thought it right first to put him to the proof that he was tenant, but he failed to prove it, and there was an end of the action.

Here there is a conflict of testimony, and I have no means of forming an opinion as to which is right and which is wrong. I think that the application of the rule should be limited to extraordinary and exceptional cases, and I think the case of *Emma Silver Mining Company* v. *Grant* (1) was an extraordinary and exceptional case. As I said at the beginning it never was intended that the conduct of the action should be taken from the Plaintiff and given to the Defendant under this rule, nor was it intended that in a case where the Defendant deliberately made the issue one of the issues in the action instead of bringing a separate action for specific performance that he should be entitled to change his mind in the middle of the case, and to have that issue tried first.

With regard to the costs: it is an unfortunate experiment, and I must refuse this motion with costs.

Solicitors: *Laurance, Plews, & Baker; Linklater, Hackwood, Addison, & Brown.*

(1) 11 Ch. D. 918.

BLAKE *v.* BLAKE.

M. R.
1880
April 22.

[1879 B. 592.]

Settled Estate—General Power of Appointment—Proceeds of Sale of Real Estate—Will—Construction—Appointment of Real Estate, and Residuary Gift of Personal Estate.

Under a settlement a testator had a general power of appointment over the reversion in fee of certain real estate thereby settled and which the trustees were empowered to sell with his consent, there being no express power of reinvestment of the proceeds of sale. During his lifetime, and with his consent, parts of the real estate were sold. Shortly afterwards—some of the real estate still remaining unsold—he made his will, whereby, after reciting that under the settlement the real estate comprised therein was subject to such uses as he should appoint, he appointed the same to the use of trustees for a term of 500 years, and, subject thereto, to the use of his son in fee: and, without prejudice to that appointment, he gave all the real and personal estate of or to which he was seised or possessed, or over which he might have any power of appointment, to his widow absolutely :—

Held, that the purchase-money of the real estate sold—which had been received by the trustees of the settlement and invested by them in *India* Stock—passed to the widow under the residuary gift, and not to the son under the prior appointment.

Gale v. *Gale* (1) followed.

BY the ante-nuptial settlement, dated the 31st of October, 1831, of *James Bunbury Blake* and the Plaintiff *Catherine Blake*, his wife, the undivided fourth share of *Catherine Blake* in the proceeds of the sale of the real estate devised upon trust for sale by the will of her father, Sir *Thomas Pilkington*, was assigned to trustees upon trust to invest the same in some of the public stocks or funds, or upon Government or real securities, and to hold the said trust moneys, stocks, funds and securities upon certain trusts therein mentioned for the benefit of the husband and wife and their children: and the settlement contained a power for the trustees, at the request of the husband and wife and the survivor, to accept real estate instead of such proceeds of sale as aforesaid, such real estate to be settled upon the same trusts as were hereinbefore declared concerning the said trust moneys, stocks, funds, and securities, or as near thereto as circumstances would admit:

(1) 21 Beav. 349.

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and also a power for the trustees at the like request to lay out any of the said trust moneys and premises in the purchase of freehold lands and hereditaments in *England*, to be conveyed to the trustees upon trust to stand possessed thereof as "personal property to and for such and the same trusts" as were thereinbefore declared concerning the said trust moneys, funds, and securities thereby settled: also a power for the trustees with the consent of the husband and wife and the survivor to sell or exchange any of the hereditaments which should be acquired under the provisions therein contained, and to receive and give discharges for the purchase-money of the hereditaments sold.

The settlement contained no express directions for the reinvestment of the purchase-money arising from the sale of hereditaments under the aforesaid power, but it went on to authorize the trustees with the consent of the husband and wife and of the survivor "to make sale, dispose of and transfer all or any part of the stocks, funds, and securities which should become vested in them under the trusts aforesaid, and to place out the money arising by such sale, disposition, or transfer upon any other Government or real security," all such new securities or funds to be held upon the same trusts as "the said trust moneys."

By certain indentures of lease and release dated the 18th and 19th of September, 1833, certain manors and hereditaments of the said Sir *Thomas Pilkington* were conveyed to the trustees of the settlement in lieu of the share of the proceeds of sale assigned to them as aforesaid.

By an indenture dated the 10th of April, 1860, to which *James Bunbury Blake*, *Catherine Blake*, their only son *George Pilkington Blake*, and the trustees of the settlement of 1831, were parties; after reciting the settlement, and that under the trusts therein contained the said *J. B. Blake*, *C. Blake*, and *G. P. Blake* were then together absolutely entitled to the trust property; and after reciting the lease and release of 1833, and that the trustees had sold part of the hereditaments conveyed to them as aforesaid, and had invested the proceeds of such sale in the purchase of other hereditaments; and after reciting that the entirety of the hereditaments then subject to the trusts of the settlement of 1831 consisted of the manor and other freehold and copyhold here-

ditaments described in the first and second schedules of the now stating indenture; and after reciting that the said *J. B. Blake*, *C. Blake*, and *G. P. Blake* were desirous that the said manor and other hereditaments should be discharged from and remain no longer subject to the trusts and powers of the settlement of 1831, except and without prejudice to the power of sale and exchange thereby given to the trustees thereof, and such other trusts and powers as might be necessary for giving effect thereto; it was witnessed that the said manor and hereditaments were conveyed—discharged from the trusts and powers of the settlement, except and without prejudice as aforesaid—to the use of the original trustees during the joint lives of the said *J. B. Blake* and *C. Blake*, upon trust, during the joint lives of the said *J. B. Blake* and *C. Blake*, to pay one moiety of the rents and income thereof to the said *J. B. Blake*, and the remaining moiety to the said *C. Blake* for her separate use, and after the death of the survivor, if the said *C. Blake* should be the survivor (an event which happened), to the use of the trustees during her life upon trust to pay the whole of such rents and income to her for her separate use; and after the decease of the survivor, then, as to one moiety of the said hereditaments and premises, to such uses as the said *J. B. Blake* should by deed or will appoint, and as to the same moiety, in default of such appointment, and as to the remaining moiety, after the decease of such survivor, to the use of the said *J. B. Blake*, his heirs and assigns. And it was declared that the trustees should stand possessed of the stocks, moneys, funds, and securities then or thereafter to be vested in them as trustees of the settlement of 1831, discharged from the trusts and powers of that settlement, except and without prejudice as aforesaid, but upon the trusts and subject to the powers by the now-stating indenture declared concerning the hereditaments and premises thereby assured, or as near thereto as circumstances would admit.

During the lifetime of *J. B. Blake*, and—as it appeared from the evidence—about the beginning of April, 1873, some parts of the real estate comprised in the settlement of 1860, were sold, and still larger portions were contracted to be sold, the contracts being completed after his death. All these sales and contracts were made with his knowledge and written consent, he being a

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party to them and the proceeds of sale being received by the trustees and invested by them. Such investments consisted, at the present time, of the sum of £11,428 9*s.* 8*d.* *India* £4 per Cent. Stock standing in the names of the trustees. Parts of the settled real estate still remained unsold.

By his will, dated the 19th of July, 1873—that is, shortly after the sales—*J. B. Blake*, after reciting that by virtue of the indenture of April, 1860, "the manors and other hereditaments" comprised therein were limited, from and after his own death and that of his wife, as to one moiety thereof, to such uses as he should appoint, did, "in execution of the aforesaid power, direct, limit, and appoint that from and after his own death and that of his wife the same moiety of manors and other hereditaments should remain" and be to the use of trustees for a term of 500 years, upon trusts thereinafter declared, and, subject thereto, "to the use of his son, the said *G. P. Blake*, his heirs and assigns for ever." And, after declaring the trusts of the term, he declared that, "subject and without prejudice to the appointment he had made of the moiety of the said manors and other hereditaments, he gave, devised, and bequeathed all the real and personal estate whatsoever and wheresover of or to which he might be seised or entitled, or over which he might have any power of appointment, to his wife *Catherine Blake*," whom he appointed his sole executrix.

The testator, *J. B. Blake*, died on the 15th of July, 1874, leaving his wife, *Catherine Blake*, and his son, *G. P. Blake*, surviving him.

Catherine Blake claimed that, under the above circumstances, she was absolutely entitled, as her husband's residuary legatee and appointee, to one moiety of the *India* £4 per Cent. Stock representing the proceeds of sale of the settled estate. *G. P. Blake*, on the other hand, claimed to be entitled to the whole fund, as to one moiety, under his father's appointment to him, and as to the other moiety, under the limitations of the settlements.

This action was brought by *Catherine Blake* against *G. P. Blake*, who was also a trustee of the settlement of 1860, and the other trustee of that settlement, for the purpose of having the question decided.

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Chitty, Q.C., and *Jason Smith*, for the Plaintiff:—

We submit that the appointable moiety of the *India* stock passed to *J. B. Blake's* widow under his residuary gift or appointment, and that the prior appointment to his son being, in terms, of land only, was insufficient to pass the stock which was substituted for it. We rely upon *Gale* v. *Gale* (1) as an authority precisely in point; and *Collinson* v. *Collinson* (2) is a decision to the same effect.

As regards the real estate which was sold, the appointment or gift of it was adeemed by its subsequent change of state. The facts of this case go to shew that the testator in making the appointment to his son was intending to deal only with the then existing "manors and other hereditaments." The sales were made with his consent very shortly before the date of the will, and for a large amount, so that he could not have forgotten what he had done. Then the limitation of the term of 500 years is wholly inconsistent with the notion that he intended his son to take the proceeds of the property which had been sold.

His real wish and intention seems to have been that his son, who was already entitled in reversion to one moiety of the land remaining in specie, should take the other moiety, but that what was represented by money should go to his widow.

Davey, Q.C., and *Whitehorne*, for the Defendant *G. P. Blake*:—

The decision in *Gale* v. *Gale* has been disapproved by Lord *St. Leonards* (3), who calls it "a narrow construction" of the 23rd section of the *Wills Act*, which provides that "no conveyance or other act made or done subsequently to the execution of a will" relating to real estate shall prevent the operation of the will with respect to such estate or interest in it as the testator shall have power to dispose of at the time of his death. Both he and Mr. *Roper* (4) consider that the mere subsequent change of state of the settled property, though made with the concurrence of the appointor, ought not to defeat the appointment of that property in its new state. And in a recent case of in *In re Johnstone's Settle-*

(1) 21 Beav. 349.
(2) 24 Beav. 269.
(3) Sugden on Powers, 8th Ed. p. 308.
(4) Roper on Legacies, 3rd Ed. p. 291; 4th Ed. p. 332.

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ment (1) Vice-Chancellor *Malins* also expressed his dissent from that case, and he there states that in an unreported case of *Adye* v. *Adye*, decided by Mr. Justice *Fry*, and affirmed on appeal, where a certain real estate was appointed under a power, and the estate was sold and the money invested, it was held that the appointee took the produce of the sale (2).

In *Cooper* v. *Martin* (3) a testatrix had a power to appoint, within a certain time, the proceeds of sale of certain real estate held upon trust for sale. She appointed the estate by name. The appointment was held to be bad, not having been exercised in time; but Lord *Cairns*, differing on that point from Vice-Chancellor *Stuart*, was of opinion that if the appointment had been in other respects good the proceeds of the sale of the estate would have passed under the appointment of the estate. Although the character of the settled property may be altered, yet it may pass under a gift of that property. This is a case of *falsa demonstratio*, the testator imagining the proceeds of sale were real estate. His intention was that his son should take the whole of the manors and hereditaments specified in the schedules to the deed of 1860 in whatever shape they might be; the scheme of the will being that the power should be exercised, as far as possible, in favour of the son; and the Court should give effect to that intention notwithstanding a misdescription of personal estate as real estate: *Travers* v. *Blundell* (4). This is not a case of ademption at all: it is not as if this fund had been mixed with the testator's own property, for it can be be traced and identified as the property substituted for the real estate sold, the testator's intention being that it shall devolve in the same way as if it had remained real estate: *Moore* v. *Moore* (5); *Morgan* v. *Thomas* (6).

JESSEL, M.R.:—

If I entertained a very strong and clear opinion that the decision in *Gale* v. *Gale* (7) was erroneous, it is possible that I might

(1) 14 Ch. D. 162.
(2) Upon inquiry from the counsel engaged in *Adye* v. *Adye* it was ascertained that the appointment in that case was made by deed and not by will.
(3) Law Rep. 3 Ch. 47.
(4) 6 Ch. D. 436.
(5) 29 Beav. 496.
(6) 6 Ch. D. 176.
(7) 21 Beav. 349.

make use of the observations of Lord *St. Leonards* and Vice-Chancellor *Malins* to aid me in differing from the decision in that case, although it is dated so long ago as the year 1856; but I cannot say that I do entertain such a strong and clear opinion. I should have had very great difficulty in deciding this case if it had come before me unprejudiced by authority; but where I find a case which is in point, and which has got into all the text-books, I am not at liberty to treat it as an authority of no weight. *Gale* v. *Gale* (1) is commented upon only in one of the text-books—no doubt a book of very great authority—but in a way which does not apply to the case before me. Lord *St. Leonards* says of that decision (2): "This appears to be a narrow construction of the Act."

Now that refers to sect. 23 of the *Wills Act*. I am by no means prepared to agree that it was a narrow construction. I understand the 23rd section of the Act to refer to an interest remaining in the property, and I see in the note to the last edition of Mr. *Shelford's* book (3) several authorities are quoted which shew that that is the meaning of the section. There it is said, "This clause of the Act applies to cases where testators, after having devised their estates, make conveyances of them which are to have the same effect as fines or recoveries, or where they mortgage the devised estates in fee and afterwards take a reconveyance of them to themselves and a trustee to bar dower, but it does not apply to cases where the thing meant to be given is gone."

I take it that is the true view of the 23rd section. I can therefore derive no assistance from it as regards this particular testamentary appointment, because here the property is gone.

Then the other point upon which Lord *St. Leonards* relies is this, that in the case of *Gale* v. *Gale* there is a direction for sale and payment of the proceeds, and he says: "The testator did not intend his legatees to take the settled estate itself, but the produce of it, and that was precisely the condition in which the settled property stood at his death. The reinvestment of the money in another estate should have made no difference, for the disposition by the will was really of the settled property, and would embrace it in whatever shape it existed."

(1) 21 Beav. 349. (2) Sugden on Powers, 8th Ed. p. 308.
(3) Shelford's Real Property Statutes, 8th Ed. p. 520.

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That does not occur here, because here it is no doubt a gift of the property as real estate; therefore the criticisms on the decision do not apply to the case before me. As I said before, that is a decision twenty-four years old. Now, do the words of the will admit of doubt? One must consider what the facts were. As to a portion of this very property, it had been sold for a very large sum of money just before the will was made. When I say just before, I understand that the sales were effected about the beginning of April, and this will was made on the 19th of July of the same year. The sales were made with the assent of the testator, who was a party to them; and can I assume or presume that he had forgotten them? I think it would be doing violence to every ordinary rule of presumption of fact to imagine anything of the kind. They were sales for a very large sum of money altogether —several thousands of pounds—and I cannot suppose that he forgot them. Then I must read the will assuming that he still remembered so recent and important a transaction, and what do I find? He knew perfectly well that a moiety of the settled estate had been conveyed to such uses as he should appoint, and then he made a gift of that same moiety to uses, including a term, and subject to the term, to his son, in fee. Would it not be a straining of language to say that that gift included the purchase-money of a part of the estate which had been sold? The case of *falsa demonstratio* has really no direct bearing on the subject, because, although in one sense there is not anything to answer the description, in another sense there is the same moiety of land remaining, although not the same moiety of all the land; and it can hardly be assumed that a man who knew that part of the property had been sold intended to give the proceeds by such words as these.

As I said before, I should have had very great difficulty, even had there been no decision, in saying that a gift of land in this shape was intended to comprise property which was actually money, and which would remain money but for some act of the testator during his life. That, I think, disposes of the first argument.

Now I come to the second argument, which certainly involves the first, because the second argument amounts to this—that when the testator gives the land he intends to give whatever is

comprised in the settlement. But am I at liberty to say so? When a man gives land which is comprised in the settlement, which he knows can only be sold with his own consent, what right have I to say that he intends to give the proceeds? What is the distinction in principle between his own land, if the money were kept separate, and land comprised in a settlement which can be converted into money only with his own consent? The reasonable assumption in the first case is that the character of the thing given is changed by the act of the testator, and he has thereby revoked his will by destroying or preventing the continued existence of the subject-matter of the gift. Is it not exactly the same when he sells or joins in selling the estate which he has given, which was the subject of the settlement? It is quite intelligible that he would give the land to the son whilst it is land, and especially as it is a moiety, the son being entitled to the other moiety, but that when he was converting it into money, he should prefer that the widow should have it; in fact, as regards the general feeling of landowners, it is not only intelligible, but it is proper. I do not feel myself at liberty to read this will in the manner suggested, as meaning that it gives whatever is comprised in the settlement, in whatever shape it may exist. I prefer to read it literally and to treat myself as bound, for this purpose at all events, by the decision in *Gale* v. *Gale* (1); and, therefore, although I admit it is a question, as I said before, of very great difficulty, and one upon which the elaborate and careful arguments that have been addressed to me on the part of the Defendant deserve very great consideration—which I hope I have given to them—yet it does appear to me that the best way of dealing with the subject-matter devised by this will is to read the will literally; to take it that the testator does intend his son to have the land, and that when the land is sold that there is no evidence of intention by the gift of the land so sold, that the son should take the proceeds of the sale. That being so, I decide in favour of the Plaintiff.

I may mention, and perhaps I should say, that the case before Vice-Chancellor *Malins* appears, to my mind, to be wholly distinguishable, as I read it, and there was no absolute necessity for him to differ from the case of *Gale* v. *Gale*. Whether the Vice-

(1) 21 Beav. 349.

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Chancellor's decision can or cannot be supported it is not for me to say.

The case of *Adye* v. *Adye* turns out to be a case in which the appointment was by deed, and it therefore has no application to this case.

Solicitor for Plaintiff: *G. Robins*, agent for *Salmon & Son, Bury St. Edmunds.*

Solicitors for Defendants: *Last & Sons.*

M R. 1880 *April* 26.

In re REES.
REES *v.* GEORGE.

[1873 R. 61.]

Practice—Administration Action—Parties served with Notice of Decree—Further Consideration—Order against Party without Notice.

When notice of an administration judgment has been served on parties interested, and afterwards, on further consideration, it is desired to obtain an order against them personally for payment of money, they should be served with notice of the action having been set down for further consideration, even though they have not obtained an order to attend the proceedings.

IN this case a decree had been made for the administration of the real and personal estate of a testator.

The tenant for life and two of the residuary legatees had been served with notice of the decree, but had not obtained an order to attend the proceedings.

The action now came on upon further consideration, when the Plaintiff asked that the tenant for life might be ordered to replace as capital certain sums which had been paid to her as income, and also that the residuary legatees might be ordered to repay to the tenant for life sums which she had advanced to them for maintenance.

It appeared that neither the tenant for life nor the two residuary legatees had had notice that the action had been set down for further consideration.

Chitty, Q.C., and *F. H. Colt*, for the Plaintiff, submitted that an

order might be made against the tenant for life and residuary legatees, notwithstanding the facts above stated. They referred to *Whitney* v. *Smith* (1); *Doody* v. *Higgins* (2).

Ince, Q.C., *Romer*, and *Decimus Sturges*, for other parties.

JESSEL, M.R.:—

I do not think that an order of this kind—an order against people personally—ought to be made without previous notice to them. But at any rate I have a discretion, under Rules of Court, 1875, Order XVI., rule 7, to order notice to be given to these persons. Let notice be given to them, and let the action stand over for a fortnight for that purpose.

Solicitors: *E. Warriner*, agent for *Gibbs & Llewellyn, Newport, Mon.; Clarke, Woodcock, & Ryland*, agents for *Farr & Wade, Newport, Mon.; Hunt & Son*, agents for *C. R. Lyne, Newport, Mon.*

CHANDLER *v.* POCOCK.

M. R.
1880
April 26.

[1879 C. 346.]

Settlement—Real Estate—General Power of Appointment—Power of Sale—Direction to lay out Money in Purchase of Land—Conversion—Reinvestment in Government Funds—Will—General Bequest—"My personal Estate"—Exercise of Power of Appointment—Wills Act, 1837 (1 *Vict. c.* 26, *ss.* 1, 27).

By *A.*'s marriage settlement, dated in 1832, her father settled certain real estate to the use of *A.* for life, and after her death, and, in default of issue of the marriage, to the use of such persons as she should by will appoint. The settlement contained a power for the trustees to sell the real estate with a direction to lay out the proceeds, with *A.*'s consent, in the purchase of other hereditaments to be settled to the like uses, with a power of interim investment, with the like consent, in Government securities.

By his will, dated in 1831 and confirmed, subject to the settlement, by a codicil executed in 1832, shortly after the settlement, *A.*'s father devised the property, subject to the settlement, and all other his real estate, to the use of *A.* for life, and, in default of her having any issue, to such uses as she should by will appoint.

Some years afterwards, *A.*'s father and husband both having died and there

(1) Law Rep. 4 Ch. 513. (2) 9 Hare, App. xxxii.

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having been no issue of the marriage, the trustees of the settlement, at *A.*'s request, sold all the settled real estate for a sum of £24,226 2*s.* Consols, which they transferred to her.

A. died a widow in 1879, having by her will, dated in 1875, shortly after the transfer to her of the consols, after appointing executors and bequeathing pecuniary legacies amounting to upwards of £30,000, bequeathed "all the residue of my personal estate and effects whatsoever" to two persons absolutely. The personal estate to which *A.* was entitled at the date of her will and of her death, independently of the £24,226 2*s.* Consols, did not amount to more than £6000:—

Held, that, having regard to sect. 27 of the *Wills Act*, 1837 (1 Vict. c. 26), and the interpretation clause, sect. 1 ("personal estate"), *A.*'s will should be read as an appointment of "all the Government and other funds and all personal property over which I shall, at the time of my death, have a general power of appointment by will"; and that the will operated as an execution of the powers of appointment over the real estate given to her by her marriage settlement and her father's will, and passed the consols.

DEMURRER to statement of defence.

The statement of claim alleged to the following effect:—

Edward Lee, by his will, dated the 30th of August, 1831, devised his freehold hereditaments at *Compton*, in the county of *Berks*, and at *Box*, in the county of *Wilts*, and all other his real estate, to the use of his daughter, *Ann Lee*, for her life, with remainder to the use of trustees for a term of 500 years to raise portions for her younger children, with remainder to divers uses in favour of her issue; and, in default of such issue, to such uses as the said *Ann Lee* should by will, notwithstanding her coverture, appoint; and in default of such appointment, to the use of the testator's nephew, *Edward Lee Baldwin*, in fee.

In 1832 *Ann Lee* married *John Brown*, and a settlement was executed prior to such marriage. By this settlement, which was dated the 14th of July, 1832, and made between the said *Edward Lee* of the first part, the said *Ann Brown* of the second part, the said *John Brown* of the third part, and the trustees of the fourth part, the said *Edward Lee* limited the *Compton* estate, after the solemnization of the marriage, to certain uses for the benefit of the said *Edward Lee*, *John Brown*, and *Ann Brown* respectively during their respective lives, and after their several deceases to divers uses in favour of the issue of the marriage; and, in default of such issue, to the use of such person or persons and in such manner as the said *Ann Brown*, whether covert or sole, should by

will appoint; and, in default of such appointment, to the use of the said *Edward Lee* in fee. And the settlement contained a power for the trustees, during the lives of the said *Edward Lee*, *John Brown*, and *Ann Brown*, and the lives and life of the survivors and survivor of them, by their, his, or her direction to sell all or any part of the hereditaments thereby settled, and for that purpose to revoke the uses thereinbefore limited: and it was provided that the trustees should lay out the money arising from such sales in the purchase of other freehold hereditaments in *England*, or of copyhold or leasehold hereditaments convenient to be held with the freehold hereditaments so purchased; yet so that during the lives of the said *Edward Lee*, *John Brown*, and *Ann Brown*, or the lives or life of the survivors and survivor of them, such purchases should be made with their, his, or her consent in writing: and also that the trustees should settle the hereditaments so to be purchased to the same uses as were thereinbefore declared concerning the hereditaments sold, or as near thereto as circumstances would admit: and that, until the money should be so laid out, it should be lawful for the trustees, with such consent as aforesaid, to invest it upon the stocks, public funds, or other Government securities in the *United Kingdom*, and that the dividends arising from such investments should be paid to the person or persons to whom the rents and profits of the hereditaments purchased would be payable.

By a codicil dated three days after the settlement, *Edward Lee* redevised the hereditaments comprised in the settlement to the uses of his will, subject to the limitations of the settlement; and in other respects confirmed his said will.

Edward Lee died in 1843.

John Brown died in 1853.

In the year 1855 the trustees of the settlement sold all the hereditaments therein comprised for the sum of £24,226 2*s*. Consols, which was thereupon transferred into their names by the purchaser.

In 1875 the then trustee of the settlement transferred the Consols to the said *Ann Brown*.

The statement of claim then went on to allege that the said *Ann Brown* died on the 18th of July, 1879, without ever having

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had any issue, "and without having in anywise exercised the powers of appointment given to her by the said settlement, and the said will of the said *Edward Lee*, as confirmed by his said codicil thereto, respectively, or either of such powers," but having by her will, dated the 24th of July, 1875, appointed the Defendants, *Thomas Canning* and *Thomas Chandler*, her executors.

The said *Edward Lee Baldwin* died in 1857, having by his will devised and bequeathed all his real and personal estate to his wife *Elizabeth Baldwin* absolutely. She died in January, 1879, having by her will devised and bequeathed all her real and personal estate to her son, the Plaintiff, *William Chandler*, whom she appointed her sole executor.

The Consols were now in Court under an order made in the action.

The Plaintiff claimed a declaration that he was entitled to the Consols.

The Defendants, the executors of *Ann Brown's* will, delivered a statement of defence in which they alleged as follows:—The transfer of the Consols to *Ann Brown* was made at her request in the belief that she was absolutely entitled to dispose thereof as she thought fit. By her will—which was said to have been executed shortly after the transfer to her of the consols—after appointing the Defedants *T. Canning* and *T. Chandler* her executors, and after bequests of specific legacies, and of pecuniary legacies to the amount of £30,500, to be paid free of legacy duty, she proceeded as follows:—"I give and bequeath all the residue of my personal estate and effects whatsoever unto and equally between *William E. N. Browne* and *Mary C. Browne* for their own absolute use and benefit. And I direct that interest at the rate of £4 per cent. per annum on the several legacies or sums of money hereby bequeathed from the day of my decease until the same are respectively paid or invested upon the trusts of this my will, shall be paid to the respective legatees. And I give and devise to the said *T. Canning* and *T. Chandler* all such real estates as are vested in me as trustee or mortgagee, subject to the equities affecting the same respectively."

By a codicil dated in 1879 the testatrix gave additional pecuniary legacies to the amount of £850, free of legacy duty, but in other respects confirmed her said will.

The personal estate to which *Ann Brown* was entitled at the dates of her said will and codicil respectively, and at the time of her death, independently of the said sum of £24,226 2*s.* Consols, and of a sum of £3163 10*s.* 9*d.* Consols produced by the sale of the freehold property at *Box* mentioned in her father's will, did not amount to more than £6000, and her debts, and funeral and testamentary expenses, amounted to at least £200.

Under these circumstances the Defendants submitted that the will of *Ann Brown* operated as a valid execution of the powers of appointment given to her by the settlement, and by her father's will and codicil, and accordingly that the fund in Court passed to them as her executors.

The Plaintiff demurred to the statement of defence on the ground that the will of *Ann Brown* disposed only of personal estate and of real estate vested in her as a trustee or mortgagee, and did not dispose of, or operate as an appointment of, any other real estate; and did not operate as an execution of the aforesaid powers of appointment; and that the fund in Court was, by virtue of the settlement, of the nature of real estate.

Chitty, Q.C., and *J. G. Wood*, for the Plaintiff, in support of the demurrer:—

Had this been a power to appoint personal estate, no doubt the case would have been covered by sect. 27 of the *Wills Act*, 1837 (1 Vict. c. 26); but this is not a power to appoint personal estate, but to appoint land, which could only have been effectually exercised by a general devise of real estate. The converse point was decided in *Adams* v. *Austen* (1), where it was held that a general devise of lands was not a good execution of a power to appoint moneys to arise from the sale of land. Here the power of appointment is not over the proceeds of sale of the land settled—in which case a general bequest of personal estate might have been a sufficient exercise of the power: *Standen* v. *Standen* (2)—but only over the land settled and the land which might be substituted for it. *Lingen* v. *Sowray* (3) and *Guidot* v. *Guidot* (4) are authorities that money directed to be laid out in land will only pass under a general devise of lands.

(1) 3 Russ. 461.
(2) 2 Ves. 589; 6 Bro. P. C. 193.
(3) 1 P. Wms. 172.
(4) 3 Atk. 254.

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The rule applicable to this case is thus stated by Sir *J. Jekyll* in *Lechmere* v. *Earl of Carlisle* (1): "The rule in all such cases is, that 'What ought to have been done shall be taken as done,' and a rule so powerful it is as to alter the very nature of things, to make money land, and, on the contrary, to turn land into money."

[JESSEL, M.R.:—He does not mean to say that the rule turns sovereigns into acres, or *vice versâ*. What he means is that it works a conversion for the purpose of devolution.]

We submit that the question in this case is one of devolution. The rule is one of universal application. "It is in equity a universal rule, that money directed to be laid out in the purchase of land, or land directed to be sold and turned into money, shall be considered as that species of property into which it is directed to be converted; and this, in whatever manner the direction is given, whether by will, by way of contract, by marriage articles, by settlement, or otherwise, and whether the money has been actually deposited in the hands of trustees for the purpose, or is only covenanted to be paid, and whether the land has been actually conveyed, or is only agreed to be conveyed": *Lewin* on Trusts (2); *Fletcher* v. *Ashburner* (3).

Davey, Q.C., and *Rigby*, for the Defendants, were not called upon.

JESSEL, M.R.:—

I must say, it appears to me that upon a fair construction of the Act this sum of Consols passed under the will in question. I say "it appears to me," because I do not mean or pretend to say that another person or another Judge may not honestly entertain a different opinion. It depends entirely upon the mode in which you read the Act of Parliament. My mind is so constituted that I always prefer the literal reading, unless there is something in the context which prevents me from adopting the literal reading: and I am going to do that here.

Of course, I can well understand it may be said that the literal

(1) 3 P. Wms. 215.
(2) 6th Ed. p. 768.
(3) 1 Bro. C. C. 497, 499; 1 W. & T. L. C. 5th Ed. pp. 896, 903–905.

reading is not the right one, and that the Act ought to be read as if it had been framed thus: "For the purpose of this Act, all property subject to a general testamentary power shall devolve or pass under the will exactly in the same way as if it were the testator's own property." If the Act had said that, I think it would have produced a different result as regards the will I have before me: but has the Act said that? Let us see what it has said. The 27th section has said—I pass over the first part of it relating to real estate, as we are dealing now with a disposition of personal estate—"A bequest of the personal estate of the testator, or any bequest of personal estate described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will."

Now, the first question to be considered is—what is the meaning of the words, "a bequest of the personal estate of the testator"? I have no doubt that a bequest of "my personal estate" is not only the natural way, but almost the only way, in which you can describe in a will a bequest of personal estate of a testator. He naturally would use the personal pronoun—"I bequeath my personal estate." That is a bequest of personal property and of personal estate—"a bequest of the personal estate of the testator"; a "bequest of personal property described in a general manner." It is not the less general because the testator uses the word "my." I consider that either branch of the clause would have carried anything subject to a general power by way of appointment under the bequest of "my personal estate."

I now come to the next question, which is more difficult—What is the meaning of the words "personal estate" in this section, when there is personal estate liable to be laid out in real estate, and, according to the doctrine of Equity, to be treated for the purpose of devolution, as real estate; that is, personal estate "constructively converted," as it has been called? Now, first of all, you must consider from what time the will speaks. In our days a will, as regards property, speaks from the time of the death; and, therefore, cases which decided that a will made under

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the old law did not include after-acquired land of the testator, have no application to a will under the present law.

Consequently, a bequest of "my personal estate" is, in my opinion, not only a bequest of the actual personal estate of the testator, but also a bequest of all the personal estate over which at the time of his death he shall have a general power of appointment by will. Accordingly such a bequest should be read as if it included these words, "I appoint all the personal estate over which I shall have at my decease a general power of appointment by will."

What is the "personal estate" to which the Act refers? Not the personal estate of anybody in particular, for it says "personal estate," generally. What is personal estate or what is real estate you must find out from the nature of the property itself: it may be real estate as to devolution as regards the remainderman who takes in default of the exercise of the power, or even as regards the testatrix herself, while she is alive: but the question is—Is it actually real estate, or is it actually personal estate?

Reading, then, the will as containing the words "Any personal estate which I have power to appoint," what does it include? For an answer to that question I turn to the interpretation clause of the Act (sect. 1), and I find that the words "'personal estate' shall extend to leasehold estates and other chattels real,"—those are the things themselves, evidently: the clause refers, not to the interest of anybody in them, but to the nature of the things,—"and also to moneys, shares of Government and other funds,"—recollect, these are the words: I shall see presently whether we are dealing with "shares of Government funds,"—"securities for money (not being real estates), debts, *choses in action*, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator." Those last words refer to an interest; the former words do not: and, therefore, we have got this, that "personal estate" includes Government funds.

Now, let us look at the will as if it stood thus: "I appoint all the Government and other funds and all personal property which at the time of my death I shall have power to appoint" to *A. B.* That is literally the meaning of the Act. What does it cover? Does it not cover bank annuities, which are Government funds,

and which in the present case were, at the moment of death, liable under the trusts of the settlement, to be laid out in the purchase of land over which the lady had a general power of appointment only? Why should I say there is a "contrary intention," when I cannot assume anything of the kind? But it may be said, according to the authorities, if she had given "my personal estate" to *A. B.*, and, instead of having a power of appointment, she had been absolutely entitled to the reversion in remainder with an intermediate interest—for that is all the authorities go to—the reversion would not have passed. There is no authority that I know of which goes to this, that if she had a life interest only—as she in fact had—and, subject to that life interest, she was absolute owner, the annuities would not have passed under the gift. In fact, it is clear that a gift of the bank annuities over which she had a power of appointment would have passed them: but the question is whether the gift of "my personal estate" would have passed them when there is no interest in anybody else who at the moment of her death would be entitled to call for conversion.

What the authorities do decide is this, that where there are persons entitled to an intermediate interest who, after the death of the testator, have still a right to call for the investment of money in land, there it is real estate of the testator, and a gift of "my real estate" would pass it, but a gift of "my personal estate" would not. I agree, not only is that covered by authority, but I should think that the question was not arguable at the present day, as the authorities are so old.

Then it is said that, because the gift of "my personal estate," *per se*, would not have passed the absolute reversion in the property, had there been persons entitled to an intermediate interest, it is very remarkable that the same gift in the same words should be sufficient to pass the property when she had only a power of appointment over it, not an absolute interest. But what seems to be most remarkable merely is that the statute makes "my personal estate" mean something else which is not "my personal estate"—that is all. What that "something else" is must depend upon the words of the statute.

Now, as regards the question of intention. When a testator has given "my personal estate" to *A.*, and "my real estate" to *B.*,

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he means, under the present law, that that which shall be personal estate at the time of his death is to go to *A.*, and that that which shall be real estate at the time of his death is to go to *B.* There may be constant fluctuations in the nature of the testator's property: there may be many cases in which the real estate is converted into personal estate, and *vice versâ*, without the testator knowing anything about it; and therefore there may be an element of uncertainty as to the nature of the property. There are cases of wills which naturally and of themselves involve some amount of uncertainty; but the moment we get the property fixed—"my estate at the time of my death"—there is an end of the uncertainty.

In this particular instance one can see perfectly well that there could have been no uncertainty. Consols had been transferred to the testatrix. She knew that they could not have been laid out in land without her consent: I am not speaking of her technical consent under the settlement, but of her real and actual consent by reason of the way in which the property had been dealt with. I do not, I hope, as a general rule, allow myself to be influenced by surrounding circumstances; but, if I ought to be so influenced, I never saw a clearer case than the case before me.

I therefore overrule the demurrer.

Solicitors for Plaintiff: *Rogerson & Ford*, agents for *J. Ricketts*, *Bath.*

Solicitors for Defendants: *J. Crowdy & Son.*

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1880

June 4.

[1880 C. 0190.]

Practice—Copyright—Piracy — Importing for Sale — Selling knowingly—Injunction—Costs—Copyright Act, 1842 (5 & 6 *Vict. c.* 45), *s.* 17—*Judicature Act*, 1873, *s.* 25, *sub-s.* 8.

The proprietors of an English copyright discovering a piracy by an American firm, sent notice to the agents in *England* of that firm not to distribute the copies complained of, and immediately afterwards brought an action against the agents for an injunction to restrain them from selling or importing for sale such copies in this country. The Defendants in their statement of defence stated that they had not received the copies from *America* until after the service of the writ in the action, and that when they did receive the copies they recognised the infringement of the Plaintiffs' copyright and at once determined not to sell:—

Held, that the Defendants had, within the terms of the *Copyright Act*, 1842, s. 17, "imported for sale" the copies complained of, and must, therefore, pay the costs of the action.

The offences mentioned in the *Copyright Act*, 1842, s. 17, are, to "import for sale" and to "sell knowingly" foreign piracies of copyright:—

Held, that a distinction is created by the addition in the statute of the word "knowingly" to the one offence, and therefore that a plaintiff who proceeds in respect of "importing for sale" is not required to give the defendant any notice, but may at once obtain an *ex parte* injunction. If, however, it is intended to take proceedings in respect of "selling knowingly," notice of the nature of the copies complained of should properly be sent to the importer.

Where an action is brought to enforce a legal right, and there is no misconduct on the part of the plaintiff, the Court has no discretion to refuse him costs.

Where a statute creates a new offence and imposes a penalty, the ancillary remedy by injunction may still be claimed.

THE Plaintiffs, who were a firm in *London*, trading under the name of *J. D. Cooper*, were the proprietors of a periodical publication called "*The Coachbuilders, Harness Makers, and Saddlers' Art Journal*," which was registered under the *Copyright Act*, 1842. The Defendants, Messrs. *Whittingham & Wilkin*, who also carried on business in *London*, were the agents in *England* of a *New York* firm, who were the publishers of an American periodical called "*The Hub and New York Coachmakers' Magazine*."

On the 13th of April, 1880, the Plaintiffs received by post from

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the American publishers a copy of the April number of "*The Hub*," containing matter which they found had been pirated from the English publication.

On the 14th of April one of the Plaintiffs wrote the following letter to the Defendants :—

"I beg to inform you that the April number of '*The Hub*,' a copy of which has just reached me, contains matter which if published in this country would be an infringement of copyright. I therefore herewith give you notice that, if you distribute that number in this country, I shall consider it my duty to place the matter in the hands of my solicitors."

The Defendants replied to this letter on the same day, and after acknowledging its receipt, stated that they had not seen the April number of "*The Hub*," and said that the Plaintiffs would be responsible to the American publishers for stopping its sale in *England*.

The Plaintiffs wrote on the same 14th of April to the Defendants' letter a reply in friendly terms, but repeating their former intimation of their intention to take legal proceedings if the Defendants should think fit to distribute the number in question. No further communication passed between the parties, but on the 15th of April the Plaintiffs brought the present action for an injunction to restrain the Defendants from importing into this country for sale and from selling or retaining in their possession the April number of "*The Hub*"; and at about a quarter past three on the afternoon of the same day the Plaintiffs served the Defendants with a copy of the writ, together with an interim injunction obtained *ex parte*, and a notice of motion on the next day for an injunction in the terms of the writ until the trial of the action.

The Defendants entered appearance to the writ, and gave notice that they did not require a statement of claim, and in their statement of defence stated that they had not, on the 14th of April, seen any copy of the April number of "*The Hub*," but that they received on the next day, at about half-past one in the afternoon, a parcel of one hundred copies, and that, observing that such copies were in infringement of the Plaintiffs' copyright, they

thereupon, and before any injunction was served upon them, determined not to sell or publish any copy of the April number until they had communicated with the Plaintiffs; they also stated that if they had had the opportunity they would have communicated with the Plaintiffs, and given them an undertaking in any terms they might approve of not to sell, publish, or distribute the number complained of.

On the hearing of the motion on the 16th of April the matter stood over for a fortnight, upon the Defendants giving an undertaking in the terms of the notice of motion, except as to the importing, and on the 30th of April such undertaking was continued until the trial of the action or until further order, but the Defendants declined to accept an offer made by the Plaintiffs to stay all further proceedings on the Defendants submitting to the injunction being made perpetual and paying the whole costs of the action.

The Plaintiffs now moved, under Order XL., rule 11, for judgment upon the pleadings.

The Defendants contended that they should be excused from paying the costs of the action, on the ground that they had committed no offence under the Copyright Acts.

Crossley, Q.C., and *Gazdar*, for the Plaintiffs:—

The Defendants have committed the offence of "importing for sale" within sect. 17 of the *Copyright Act*, 1842. This is admitted by their statement of defence.

Chitty, Q.C., and *Hornell*, for the Defendants:—

The Plaintiffs put us off our guard by giving us notice not to "distribute"; if they thought fit to give any notice at all, such notice should have been complete, and should have also warned us not to "import." In the next place, we could form no opinion of our own as to the infringement of the Plaintiffs' copyright until we had seen the copies complained of; when we did see them, we at once determined not to sell them. The Plaintiffs' action was, therefore, premature and unnecessary.

Lastly, the offence of "importing for sale," is a statutory offence with a statutory penalty; the Plaintiffs, therefore, are not

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entitled to an injunction, but are confined to the recovery of the penalty mentioned in the statute. We ask, therefore, that the action be dismissed with costs.

JESSEL, M.R.:—

16 RPC 457

As I understand the law as to costs it is this, that where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part—no omission or neglect which would induce the Court to deprive him of his costs—the Court has no discretion, and cannot take away the plaintiff's right to costs. There may be misconduct of many sorts: for instance, there may be misconduct in commencing the proceedings, or some miscarriage in the procedure, or an oppressive or vexatious mode of conducting the proceedings, or other misconduct which will induce the Court to refuse costs; but where there is nothing of the kind the rule is plain and well settled, and is as I have stated it. It is, for instance, no answer where a plaintiff asserts a legal right for a defendant to allege his ignorance of such right, and to say, "If I had known of your right I should not have infringed it."

The case here is this: the Plaintiffs are the proprietors of an English copyright publication, and the Defendants are the agents in this country of an American publisher. Americans can publish in their own country English copyrights without leave of the owners, and in this case this was done and without any acknowledgment in shape of payment in money, although with acknowledgment of another kind, namely, by sending a copy of the American publication to the proprietors of the English copyright, which acknowledgment, although perhaps complimentary, was not in this instance, considered satisfactory. The Plaintiffs, objecting to the publication of their copyright and the importation of these magazines into this country, which cannot lawfully be sold here, thereupon give notice of their objection to the Defendants.

Now, in my opinion, no notice was necessary on the Plaintiffs' part to entitle them to obtain an injunction against other persons for importing matter the importation of which is prohibited by the 17th section of the *Copyright Act*, 1842. That section says: "It shall not be lawful for any person not being the proprietor of the copyright, or some person authorized by him, to import

into any part of the *United Kingdom*, or into any other part of the *British* Dominions for sale or hire any printed book . . . . wherein there shall be copyright, ... and if any person, not being such proprietor or person authorized as aforesaid, shall import or bring, or cause to be imported or brought, for sale or hire, any such printed book into any part of the *British* Dominions, contrary to the true intent and meaning of this Act, or shall knowingly sell, publish, or expose to sale or let to hire or have in his possession for sale or hire, any such book, then every such book shall be forfeited." The section goes on to enact a penalty of £10 for each offence, and of a sum double the value of the forfeited copies, half the former and the whole of the latter being made payable to the proprietor of the copyright. It is therefore clear that the Act makes a distinction between importation and selling, for it does not say "knowingly import," although it does say "knowingly sell, publish, or expose for sale." It simply says "import," and for this reason, that people who import for sale or hire must carry on business at their own peril. Such persons are not like ordinary people who import for their own private use and reading, but are people engaged in business who are bound to be on the look-out, and to see that the books they import for sale are not piracies.

Persons in the position of the Defendants, that is, of agents for an American publisher, must be taken to know that Americans are in the habit of printing and exporting piratical works, and they must therefore know that they import books from *America* at the risk of their containing what is piratical, and of thus committing an unlawful act, and of being liable to be sued without notice.

A plaintiff, therefore, need not, for the purposes of proceeding under the Act in respect of the offence of importing for sale, give such a person notice at all, but can bring his action forthwith and obtain an *ex parte* injunction without notice. The giving of such notice is no doubt an act of courtesy, but it is, in my opinion, wholly unnecessary as a step to render the person importing liable in an action.

If the Plaintiffs here had given no notice there would have been no defence whatever, but, as it is, a defence has been founded on the fact that the Plaintiffs, not being very profound lawyers,

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went out of their way to give notice. [His Lordship, after commenting on the correspondence between the parties, continued:—] The Plaintiffs, after this correspondence, bring the present action for an injunction, and the Defendants, upon the motion for an interim injunction, do this: they say they never intended to sell and would give an undertaking until the trial not to sell. But when we look at the defence set up by the Defendants in their affidavits, it is clear that, notwithstanding the warning of the Plaintiffs, they received the copies for sale or hire, and knowingly kept them in their possession for sale or hire, and under the latter part of the 17th section, which has reference to the offence of selling, the Plaintiffs were right in giving the Defendants notice, for the selling or letting for hire must be knowingly done in order to constitute an offence. Then again, when the Defendants say they "never intended" to sell, that is a question in their own minds, but it is plain that they intended to wait and see whether any steps were likely to be taken to prevent them from selling. It is also clear that after notice of the piracy the Defendants did retain in their possession the copies imported, and therefore, under the later words of the 17th section, they did "knowingly have in their possession for sale or hire" these pirated works. The Plaintiffs were therefore clearly entitled to an injunction restraining the Defendants from importing for sale or hire, and they are also now entitled to an injunction restraining the Defendants from selling or retaining in their possession the copies complained of, and as there is no use in destroying such copies, and they are of no use here, I think they had better be returned to *America*. The Plaintiffs are entitled to costs as a matter of course.

There was a point not insisted upon, but mentioned during the course of the argument. It was said that the 17th section of the Act created a new offence of importation and enacted a particular penalty, and it was argued that where a new offence and a penalty for it had been created by statute, a person proceeding under the statute was confined to the recovery of the penalty, and that nothing else could be asked for. That is true as a general rule of law, but there are two exceptions. The first of the exceptions is the ancillary remedy in equity by injunction to protect a right.

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That is a mode of preventing that being done which, if done, would be an offence. Wherever an act is illegal and is threatened, the Court will interfere and prevent the act being done—and as regards the mode of granting an injunction the Court will grant it either when the illegal act is threatened but has not been actually done, or when it has been done and seemingly is intended to be repeated.

The second exception is that created by the *Judicature Act*, s. 25, sub-s. 8, which enables the Court to grant an injunction in all cases in which it shall appear to the Court to be just or convenient. This section may be said to be a general supplement to all Acts of Parliament.

I think that in this particular case an injunction can issue on both those general grounds.

There is but one thing more. I have often remarked that there is an idea prevalent that a defendant can escape paying costs by saying, "I never intended to do wrong." That is no answer, for, as I have often said, some one must pay the costs, and I do not see who else but the defendants who do wrong are to pay them.

Solicitors for Plaintiffs: *Hicks & Arnold.*
Solicitors for Defendants: *Merriman, Pike, & Merriman.*

In re HULL AND COUNTY BANK.

BURGESS'S CASE.

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June 5.

Limited Company—Winding-up—Fraudulent Prospectus—Rescission by Contributory of Contract to take Shares—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 38.

A shareholder in a company who has been induced to apply for shares by fraudulent misrepresentations contained in the promoters' prospectus, is not entitled after winding-up to rescind his contract to take the shares, even if the assets in the hands of the liquidators are sufficient to pay in full the whole liabilities of the company together with the costs of the winding-up.

The liabilities of contributories under *Companies Act*, 1862, s. 38, considered.

ADJOURNED SUMMONS.

This was a summons taken out by the liquidators of a company called the *Hull and County Bank, Limited*, that *F. J. Burgess*

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might be placed upon the list of contributories in respect of fifty shares standing in his name in the books of the company, and that he might be ordered to pay £50, being the amount payable on allotment in respect of such shares.

In September, 1878, a prospectus of the banking company, then recently formed, was sent to *Burgess*, and on the 17th of September, 1879, *Burgess* wrote the following letter addressed to the *Hull and County Bank, Limited*:—

"I request that you will allot to me fifty shares of £10 each in the *Hull and County Bank, Limited*, and I hereby agree to accept such shares, and I also agree to pay the sum of £1 per share on allotment, and a further sum of £3 per share three months after allotment."

On the 19th of September, 1879, *Burgess* received the following letter from the secretary of the company:—

"I am instructed to inform you that in accordance with your request there has been allotted to you fifty shares in the above banking company, and that the amount payable on allotment in respect of same is £1 per share, making a total of £50, which you are requested to pay to the order of the *Hull and County Bank*."

Burgess was thereupon duly registered in the company's books as the owner of such shares. On the 27th of September, 1879, *Burgess* having received information which he deemed unsatisfactory with reference to the banking company, addressed the following letter to the secretary:—

"There appears to be a dispute probably leading to litigation as to whether matters have been carried on according to arrangement, and already there is a chance of being called on to pay 25 per cent. expenses on account of shares. I was ignorant of this matter when I applied for shares. You will be good enough to cancel my allotment unless this is settled first to the satisfaction of all parties. I enclose the allotment paper."

On the 29th of September the secretary wrote to *Burgess* in reply, that his wish could not be complied with as the contract was complete, and at the same time the letter of allotment was returned.

Burgess took no further steps in the matter and kept the letter of allotment.

The company never did any business, and in November, 1878, was wound up voluntarily, and on the 7th of December an order was made that the winding-up should be continued under the supervision of the Court.

It appeared that the assets of the company in the hands of the liquidators were sufficient to pay the creditors of the company, together with all costs of the winding-up, and under these circumstances it was contended by *Burgess* that notwithstanding the winding-up order he was still as against other contributories entitled to call for a rescission of his contract to take the fifty shares, on the ground that he had been induced to enter into such contract by the fraudulent misrepresentations in the company's prospectus. It was not alleged that the contributories had been parties to the misrepresentations.

Davey, Q.C., and *W. Barber*, for the liquidators, in support of the summons :—

In this case no steps were taken by *Burgess* to rescind until after the winding-up. A contributory who waits until the winding-up cannot then call for rescission. He is too late: *Oakes* v. *Turquand* (1); *Stone* v. *City and County Bank* (2). The contention on the other side will be that the principle in *Oakes* v. *Turquand* does not apply where there are no rights of creditors to be considered, but it is submitted that this circumstance does not make any substantial distinction, and that the present case is covered by the decision in *Houldsworth* v. *City of Glasgow Bank* (3), where it was held that there can be no action by a shareholder against a company in liquidation for damages in respect of fraudulent misrepresentations inducing him to purchase shares.

[JESSEL, M.R. :—The doctrine is that after the company is wound up it ceases to exist, and rescission is impossible. There are then only creditors and co-contributories and no company, and that is the meaning of Lord *Cairns'* observations in *Houlds-*

(1) Law Rep. 2 H. L. 325. (2) 3 C. P. D. 282.
(3) 5 App. Cas. 317.

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worth v. *City of Glasgow Bank* (1). It is for the other side to say how their case can be distinguished from it.]

Chitty, Q.C., and *Grosvenor Woods*, for *Burgess* :—

Houldsworth v. *City of Glasgow Bank* was not a case of rescission. The contract there was treated as binding, and that was the difficulty felt by Lord *Cairns*. All that was decided in *Oakes* v. *Turquand* (2) was that a shareholder was not entitled to rescind if there were creditors to be paid.

In *Henderson* v. *Lacon* (3), where the bill was filed before the winding-up, the Plaintiff was held after the winding-up to be entitled to have his name removed from the register and his deposit and allotment money repaid him by the company.

In the cases of *Stone* v. *City and County Bank* and *Collins* v. *City and County Bank* (4) *Bramwell*, L.J. (5), treats *Oakes* v. *Turquand* as having been decided on the principle that the power to rescind a contract is gone, because the rights of creditors are to be adjusted.

[JESSEL, M.R. :—His attention does not appear to have been drawn to the peculiar wording of sect. 38 of the *Companies Act*, 1862.]

The case has not previously arisen where the assets being sufficient to satisfy all liabilities to creditors and costs, one contributory has gone against the others to get his calls repaid. He could have done so before the *Companies Act* of 1862, and the real question is whether, by the words of sect. 38 of that Act, the rights of contributories *inter se* are still what they would have been before the Act. The point did not arise in *Houldsworth* v. *City of Glasgow Bank*.

Sect. 38 of the Act cannot mean that we are to contribute to assets where there are no debts.

We contend that the letter of the 27th of September, 1879, was tantamount to a repudiation of the allotment.

[*Tennent* v. *City of Glasgow Bank* (6) was also referred to.]

(1) 5 App. Cas. 317.
(2) Law Rep. 2 H. L. 325.
(3) Law Rep. 5 Eq. 249.
(4) 3 C. P. D. 282.
(5) Ibid. 307.
(6) 4 App. Cas. 615.

JESSEL, M.R.:—

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I have no doubt as to the decision that ought to be given on this application. The exact point has not been discussed, but it is really covered by the prior decisions.

The present applicant applied for shares in this bank, and I have no doubt that if he had rescinded his contract in due time, whilst the bank was a going concern—if that expression could ever with propriety be applied to such a concern as this—he could have got rid of his shares. He did ask to have his contract cancelled after allotment and registration, but that application was not acceded to, and he was told that the matter was complete, and there he let it rest. Then there came a winding-up, and then a year afterwards or thereabouts he asks to be allowed to rescind the contract and to be relieved from his shares or liabilities; for the case is argued as if he were then the applicant, though he did not actually take out the summons, the real summons having been taken out by the liquidators.

Now, what is the position of the applicant? Taking it in the most favourable way for him, he has been induced to become a shareholder by fraudulent misrepresentation. Can he after winding up be relieved? I think he cannot. The first ground to be considered is this, that the winding-up order entirely alters the positions of the parties—that is, it makes the shareholders contributories, and contributories in a totally different way in some respects as regards the debts and liabilities of the concern from what they were before. It has been decided by a series of decisions in the House of Lords, commencing with *Webb* v. *Whiffin* (1), that the 38th section of the *Companies Act* is not to be read otherwise than literally, and it is not to be read with reference to the previous liabilities of the shareholders or by analogy to the law of partnership whether of a limited or unlimited character, but it is to be read as imposing new liabilities on the members of the company—liabilities imposed and defined by that section.

The result, therefore, is this, that the member is liable to contribute to the assets of the company, not only to an amount sufficient for the payment of the debts and liabilities and the costs, but to the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves.

(1) Law Rep. 5 H. L. 711.

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After winding up, the decision of the House of Lords in *Oakes* v. *Turquand* (1) was, that a defrauded man could not say, "I will get rid of my contract, to the prejudice of those persons who acquired new rights in consequence of the winding-up." As has been pointed out over and over again the position of the parties is altogether changed. Before winding up, the creditor has no right to a personal demand against any one shareholder. He looks to the company, and if the company is a going concern he would look to it as a solvent concern for payment; but after winding up, the company, though it does not technically cease to exist for all purposes, does for this purpose. The liabilities are no longer the liabilities of the company except to the extent of the assets realized, which under the 38th section of the Act are to be appropriated towards the satisfaction of such liabilities, but they become liabilities of the shareholders who are such at the time of the winding-up, that is, of the past and present members, including those who have been shareholders within the year; and those liabilities, as I said before, are defined by the 38th section.

Now, the other shareholders are as innocent of this fraud as the applicant. There is no pretence for saying that they authorized the committal of it; on the contrary, they themselves were defrauded in like manner. Therefore, they acquired rights as innocent parties under the 38th section which this applicant seeks to take away from them. It is quite true that in *Oakes* v. *Turquand* the only persons whose rights were decided upon were creditors, but the rights of other persons equally innocent were not required to be considered, because there was not enough to pay the creditors.

In this case, however, it is said that the assets of the company contributed by the other shareholders are sufficient to pay the creditors in full and all costs, and, therefore, that, the creditors having been paid or provided for, those rights are not to be considered; but, as I said before, the other contributories are also innocent persons, and have acquired rights, and I see no reason why those rights should not be considered.

I am assisted in coming to this conclusion by two *dicta* of Lord *Cairns*, one of which is contained in *Tennent* v. *City of Glasgow Bank* (2), in which he says this: "The case of *Oakes* v. *Tur-*

(1) Law Rep. 2 H. L. 325. (2) 4 App. Cas. 621.

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quand (1) in this House has established that it is too late, after winding-up has commenced, to rescind a contract for shares on the ground of fraud. This, no doubt, is on the grounds stated by the Lord President, that innocent third parties have acquired rights which would be defeated by the rescission." It is to be noticed that he states the proposition absolutely that it is too late. He gives as a reason that innocent third parties might be affected, but that does not at all affect the absolute *dictum* that it is too late.

Then, in *Houldsworth* v. *City of Glasgow Bank* (2), he says this: "It appears to have been contended in the Court below"—there the applicant was also induced to take shares by fraud—"that the Appellant might be unable to maintain the present action as a claim in the liquidation to be satisfied *pari passu* with other creditors, and yet might be able to maintain it as a claim against the company or against shareholders in the company after all other creditors were satisfied." That is very close to this. Then he says: "The *Winding-up Act* has no provisions for the payment of claims against the company except the claims of creditors. Creditors are supposed to be paid *pari passu*, and there is no provision after they are paid for opening up fresh claims by a contributory against the company. There are, indeed, provisions which, after the debts are paid, enable any inequalities in the contributions of the contributories to be set right, but that is quite a different matter." That shews that the present claim, being a claim against the company, cannot be enforced against the other contributories who were innocent. To follow out logically the theory contended for by the applicant, it would amount to this: if you come for rescission, and you have paid for your shares, you will be entitled to get your money back.

Therefore, if you have paid for your shares, and your payment has been applied in the payment of creditors, and the other contributories have not fully paid, they being equally innocent, you would be entitled on that theory to claim back the sum you had paid, and to have it paid you by a call on the other contributories. Of course that would not be enforcing the adjustment of the rights of the contributories amongst themselves, because, as I said before,

(1) Law Rep. 2 H. L. 325. (2) 5 App. Cas. 323.

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these other contributories are not the persons who committed the fraud, and they are not liable, and, consequently, if you cannot have total rescission of the contract, it is plain you cannot have partial rescission either, and the claim must wholly fail.

Solicitors: *Burton, Yeates, & Hart*, agents for *Johnson, Barclay, & Johnson, Birmingham; Bellamy, Strong, & Co.*

M. R. 1880 *June* 8, 10.

HALSEY *v.* BROTHERHOOD.

[1879 H. 111.]

Patent—Slander of Title—Allegation of Infringement—Threatening Legal Proceedings—Damages—Injunction—Practice—Statement of Claim—Leave to amend—Fraud.

A patent, so long as it subsists, is *primâ facie* good, and therefore a patentee who issues notices against purchasing from a vendor alleging infringements of his patent is not bound to follow up his notices by taking legal proceedings; and, provided he issues the notices *bonâ fide* in assertion of what he believes, though erroneously, to be his legal rights under his patent, he does not render himself liable to an action by the vendor for damages for injury caused by issuing them: though he may be liable, notwithstanding his *bona fides*, to be restrained by injunction from continuing to issue the notices, if it is proved in the action for an injunction that his allegation of infringement is untrue.

Collins v. *Hinks* (1) and *Axmann* v. *Lund* (2) considered.

THE statement of claim alleged to the following effect:—

The Plaintiff was an engineer and the assignee of a patent taken out in 1876 for improvements in engines for steam launches.

The Defendant was also an engineer, and a manufacturer of a similar class of steam-engines under an alleged patent of which he claimed to be the proprietor. The engines made by the Plaintiff and Defendant respectively were different both in form and principle, and the Plaintiff's engine did not in any way infringe the Defendant's alleged patent.

The Defendant had a large connection and a flourishing business, and he had endeavoured to prevent, and had to a considerable extent succeeded in preventing, the Plaintiff from doing a

(1) Law Rep. 13 Eq. 355. (2) Law Rep. 18 Eq. 330.

similar business by systematically threatening persons proposing and intending to be customers of the Plaintiff that, in the event of their dealing with the Plaintiff, he, the Defendant, would take legal proceedings against them and obtain an injunction restraining them from so doing. The consequence had been that in a number of instances the Defendant had deterred persons from dealing with the Plaintiff for the purchase of his engines. This course of conduct on the part of the Defendant commenced, so far as the Plaintiff had been able to ascertain, in the year 1876, and had been continued up to the present time.

The claim then proceeded to give several instances in which the Defendant was said to have asserted that the Plaintiff's engine was an infringement of his, the Defendant's, and to have threatened that he, the Defendant, would apply for an injunction. No legal proceedings, however, had been taken by the Defendant.

The Plaintiff claimed, 1. Damages for wrongfully stating and representing to the customers of the Plaintiff, and other persons intending or desiring to contract or deal with the Plaintiff for the purchase of his steam-engines, that the steam-engines made by the Plaintiff were an infringement of the Defendant's alleged patent; and for threatening such customers and persons with actions if they purchased or used the Plaintiff's engines; and for deterring and intimidating them from purchasing or using the Plaintiff's engines, and from being or becoming customers of the Plaintiff in respect of the same; and for deteriorating the sale thereof; and an injunction, and the costs of the action: and 2. General relief.

In his statement of defence the Defendant admitted the granting of the Plaintiff's patent in 1876 but denied its validity, and stated that he had obtained two prior patents in 1873 for an invention in engines for steam launches: that the engines sold by the Plaintiff were not made in accordance with his patent but were an infringement of his, the Defendant's, patent. He also admitted having represented to various persons that the Plaintiff had infringed his patent, and having remonstrated with the Plaintiff; but he denied ever having used threats of legal proceedings. He said, moreover, that the statements he had in fact made had been made by him with entire *bona fides*, and in the full

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and honest belief in his rights as a patentee, and with the intention to follow up the same, if necessary, by proper proceedings in support of his patent rights; and that if the Plaintiff had been prevented from doing business or had suffered injury as alleged (which he, the Defendant, denied), such result had been due solely to legitimate competition in trade.

The Plaintiff having joined issue, the action now came on for trial.

Ince, Q.C., and *W. W. Cooper*, for the Plaintiff:—

We submit that the Plaintiff is entitled to an injunction on the ground that there is no presumption in law in favour of the validity of a patent, and therefore a patentee is not entitled to threaten legal proceedings in order to deter persons from purchasing alleged infringements of his patent, unless he is prepared to follow up his threats by taking such proceedings: *Rollins* v. *Hinks* (1); *Axmann* v. *Lund* (2).

We are also entitled to damages by reason of the loss of trade occasioned to us by the Defendant's injurious statements: *Riding* v. *Smith* (3).

[JESSEL, M.R., referred to *Hinks & Son* v. *Safety Lighting Company* (4).]

Aston, Q.C., and *Chadwyck Healey*, for the Defendant, were not called upon, but referred to *Wren* v. *Weild* (5), as an authority that a patent must be treated as valid until set aside on *scire facias* or otherwise.

JESSEL, M.R.:—

In this case there are points of law to be considered as well as the particular allegations in the statement of claim. First of all, what is the general law on the subject? The Plaintiff is a manufacturer of steam-engines; the Defendant is also a manufacturer of steam-engines. For the present purpose I will consider only the Defendant's position as patentee irrespective of the Plaintiff's.

(1) Law Rep. 13 Eq. 355.
(2) Ibid. 18 Eq. 330.
(3) 1 Ex. D. 91, 93.
(4) 4 Ch. D. 607.
(5) Law Rep. 4 Q. B. 730, 733.

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The Defendant has a right to manufacture steam-engines according to two several patents granted to him in the year 1873, which, as far as I can see, have never been challenged. They are not alleged in the statement of claim to have been challenged. He alleges that the Plaintiff is making and selling engines which are infringements of his patent. It is said that he is not entitled to tell persons buying the Plaintiff's engines that they are infringements and that those persons are liable to an action; and that he is not entitled even to give a notice that these engines are infringements of his patent rights unless he follows up that notice by some legal proceeding. I must entirely dissent from that proposition. There is, as far as I am aware, no law in this country compelling a man to assert his legal right by action. He may, if he thinks fit, give notice to persons, the notices being given *bonâ fide*, that they are infringing his legal rights: in many cases it is his duty to do so before bringing an action, and in some cases the Legislature has compelled him to do so before bringing an action. Take, for instance, those cases of infringement of copyrights and designs, and so on, where the seller is only liable if he knows that the right has been infringed; there you must let him know before bringing an action, or your action would fail.

Again, there are a vast number of cases in which notice ought to be given. Take such cases as those of which I had not long ago several before me, as to trespassing on a common belonging to the lord of the manor: there it is most desirable that the lord should, before bringing an action, give notice to everybody not to trespass. In the cases to which I refer many of the persons were trespassing ignorantly, being incited to do so by persons who ought to have known better. Many of these trespassers were not worth suing; indeed it would have been a cruelty to sue them, because the only result would have been to ruin them and take the property of unfortunate cottagers who had trespassed in ignorance and by reason of the persuasion of others. One can see that there are a number of cases of that sort where a man is always required, not by law, but by propriety, to give notice of his rights to persons who are infringing them and request them to desist.

Now, is there any reason in the world for saying there is any

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different law with regard to patents? A man says, "I have a monopoly under the patent; you are infringing it; now please to desist;" or, "I give notice that *A. B.* is infringing: he is not worth suing: I give notice to everybody not to buy of *A. B.*" If that is done *bonâ fide* in assertion of his legal right, as far as I know there is no obligation on him to bring an action. The person may desist on warning being given, and then there is no occasion for bringing an action. The person may desist, or if he does not desist he may not be worth suing; and a man is not bound in addition to the loss incurred by the infringement, to incur the further costs of bringing an expensive action. As I said before, I am not aware of any such law, and, were it not for the two cases about which I have to say something, I should say that no countenance to any such doctrine was ever given. It is a totally different thing where a man, knowing he has no legal right, threatens proceedings for a collateral purpose. There he may be liable to an action. If a man, with a view to prevent another man carrying on his business, knowing he has himself no patent, or knowing that he has an invalid patent, or, knowing that the thing manufactured by the other man is not an infringement for the purpose of injuring the other man in his trade, threatens the purchasers or advertises that the thing is an infringement, of course he is liable like any person who makes a false assertion to the injury of another in his trade, because it is an untrue assertion and not made *bonâ fide*. The mere fact of a man mentioning he has a right, and that something is an infringement of it, does not *per se* give a ground of action. It is obvious that such a course of conduct, adopted *bonâ fide*, does not constitute a case in which an action could be maintained, for the essence of the case is the falsity of the assertion and the want of good faith in making it. That is, the assertion is made, not for the purpose of preserving the alleged legal right, but for a different purpose, and has injured the plaintiff in his trade.

All that I should have thought was reasonably plain and beyond fair comment, for it appears to me to be founded on general principles. There is no distinction that I am aware of in the assertion of a legal right under a patent, and the assertion of any other legal right. That being so, there are three

authorities to which I have been referred: I will take the earliest, *Wren* v. *Weild* (1). That was an action for damages. The plaintiffs alleged that the defendant falsely and maliciously asserted to various persons who had purchased, or intended to purchase, the plaintiffs' machines—which were spooling machines —that they were machines which were infringements of the defendant's patent. At the trial the plaintiffs offered to prove that the defendant's patent was invalid for want of novelty, and that machines involving the same principle as the defendant's machines had been used by the defendant himself before the date of his patent, so that there must have been a want of novelty. That evidence was rejected at the trial, on the ground that the evidence was immaterial, as the defendant's patent was still subsisting, not having been set aside by *scire facias;* and on the hearing before the Court of Queen's Bench that ruling was upheld, on the ground that where a person *bonâ fide* claims a right in himself which he intends to enforce against a purchaser, he is in common fairness bound to warn the purchaser that he, the purchaser, is about to infringe the right, and will thereby subject himself to very serious consequences; and he is not bound to follow up the warning by an action. But of course if he makes the threat *malâ fide*, without any intention of bringing an action, but only of injuring the vendor of the machine, there he is liable to an action. The judgment itself went a little further than what I have stated, but that is the substance of it. It is quite clear that Mr. Justice, now Lord *Blackburn*, in delivering judgment, considered that to support the action the allegations must not only assert the statement to be untrue, but that it was made without reasonable and probable cause. That is the judgment of the full Court, and it appears to me that is the substance of the law. A man merely giving notice that his rights are being infringed, believing that they are infringed, is not to be subjected to an action for giving that notice, and he is not to be subjected to an action, even although he does not follow up that notice by bringing an action at law for the infringement.

Now I come to the second point, which is rather different. Although the man who gives the notice is not subject to an action for damages, is he liable to be restrained by injunction? I think

(1) Law Rep. 4 Q. B. 730.

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he would be liable to be restrained by injunction if certain other proceedings are adopted by the persons threatened. If, for instance, the vendor of the machines finds his customers interfered with, and writes to the person who has given the notice and says, "My machines are not an infringement; if you go on threatening without bringing an action against me to try that question, I shall apply for an injunction to restrain you from interfering with my trade;" and then the defendant does not bring an action and takes no proceedings—as is the case here—and the plaintiff comes for an injunction, he may be entitled to it if he shews that the defendant's statement is false, because the defendant's threat would be a threat to continue making a statement to the injury of the plaintiff; and if it is a false statement, the plaintiff would be entitled to restrain the continuance of it to his injury, although he may not be entitled to bring an action for damages for the false statement: for if the defendant says, "I insist that those are infringements, and I will give notice to all your customers," the plaintiff has a right to try that question by bringing his action for injunction. But if in answer to that action the defendant says, "I did make the statement, and I will make the statement, but the statement is true," and he proves the statement to be true, it appears to me plain that that is a good defence to the action. I do not think that it is a good defence to the action for an injunction merely to say, "I made the statement *bonâ fide*;" because if the defendant is challenged, and says, "the statement is true, and I now maintain it," and he fails in maintaining it, and it turns out to be false, I think then that *bona fides* ought not to defend him from an injunction against continuing to make it. But if he succeeds in shewing that the statement is true, that is another thing.

There are two cases before the Vice-Chancellor *Malins*, which I am afraid have led to this action. The first is the case of *Rollins* v. *Hinks* (1). The Vice-Chancellor there lays down this proposition, that there is no presumption at law in favour of the validity of a patent; and he says this (2): "The contention of the defendant is that a patent is *primâ facie* good. But this cannot be so, for the rule is, that where letters patent have been recently

(1) Law Rep. 13 Eq. 355. (2) Law Rep. 13 Eq. 361.

granted, an injunction will not be granted until the right has been established."

I must first of all observe that *Wren* v. *Weild* (1) was cited before the Vice-Chancellor, and there the Judges had held that that was not so, because they proceeded on the assumption that as the patent had not been set aside by *scire facias* it must be taken to be a good *bonâ fide* patent. And the argument before the Vice-Chancellor—I see Mr. *Aston* was one of the counsel for the plaintiff in that very case—did not proceed on the ground upon which the judgment was based; for the argument before the Vice-Chancellor was that "a man has no right to go about asserting in general terms that another person is infringing his patent, without being prepared to justify such an assertion": that I quite understand. In that case the bill was for an injunction. The plaintiff said, "I want to restrain you, the defendant, from issuing these circulars, because they are not true." The counsel for the defendants argued that "they had a perfect right to warn others against infringing their patent. There was no difficulty in trying the validity of the patent on the *scire facias*, and the advertisement and circular were not open to legal objection."

The Vice-Chancellor's judgment is therefore founded on a proposition of law which I think is not sound. I have no doubt that a patent is *primâ facie* good as long as it stands, and the person who alleges it is not good must prove it.

Then the Vice-Chancellor says, "the rule is, that where letters patent have been recently granted, an injunction will not be granted till the right has been established." That is not quite correct either. In a case before the *Judicature Act* where the patent was of recent date, and the patentee applied for an injunction, and the defendant shewed a *primâ facie* case of invalidity proper to be tried at law, no injunction was granted on a bill, because it was said, there being a *primâ facie* case of invalidity proved by affidavit, although it may be answered by the plaintiff, the Court cannot try the case on affidavits, but must send it for trial at law. Of course now, since the *Judicature Act*, the question of invalidity would be tried in the Court in which the injunction was moved for; that is now the only difference. But the

(1) Law Rep. 4 Q. B. 730.

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question whether an injunction will be granted depends upon the question whether *primâ facie* evidence of invalidity is established which will induce the Court to say there is something to be tried. A defendant cannot come against a patentee and say, "I swear this patent is invalid," and nothing more; that will not do. Nor can he say, "I do not admit its validity." That will not do either. Therefore it is not correct to say that a patent is not *primâ facie* good; and it is not correct to say that an injunction will not be granted until the right has been established. An injunction will be granted unless the defendant has a *primâ facie* case to shew invalidity. That has always been the patent law as long as I can remember. Therefore it is plain to my mind that these propositions of the Vice-Chancellor will not support his judgment. But it may well be that the injunction was right in that case; in fact, I have no doubt it was right, because the case came before me for trial in another action (*Hinks & Son* v. *Safety Lighting Company* (1)). The fact was that the defendant dared not try. The injunction was right in fact, for the advertisements were not *bonâ fide;* but that was not the ground stated in this judgment. However I feel bound to say that in the second case before him, that of *Axmann* v. *Lund* (2), the Vice-Chancellor does take that as the ground. That case also, like *Rollins* v. *Hinks* (3), was before the *Judicature Act.* I mention that because the proceedings at law referred to in the argument and judgment were proceedings at common law. In cases under the *Judicature Act* separate proceedings in the Common Law Divisions of course cannot be necessary. The defendant may counter-claim in the very action without taking such separate proceedings; and he may say that what the plaintiff is doing is an infringement and try the question as a matter of defence.

What the Vice-Chancellor said there was this (4): "The defendant declines to undertake to take proceedings at law to establish the validity of the patent, and I retain the opinion I expressed in *Rollins* v. *Hinks* that as he will not follow up the rights he asserts by proceeding to establish the validity of the patent, he ought to be restrained from circulating threats."

(1) 4 Ch. D. 607.
(2) Law Rep. 18 Eq. 330.
(3) Law Rep. 13 Eq. 355.
(4) Ibid. 18 Eq. 338.

But it does not appear to me that that is a ground for restraining the defendant. The question really is whether the mere fact of a man threatening another that he will take proceedings for infringement is a ground for injunction, when he asserts there is an infringement. I think it is quite plain that it is not. The real point, I think, that the Vice-Chancellor intended to decide in *Axmann* v. *Lund* was that the assertion by the defendant of his rights was not *bonâ fide*. The defendant declined to follow up the assertion of his rights. I think, then, the Vice-Chancellor meant that the defendant was not acting *bonâ fide;* and if that were so, I agree that he might be restrained. What the Vice-Chancellor says is this (1): "I there stated"—that is, in *Rollins* v. *Hinks*—"that if the defendant could not be restrained from continuing to use those threats, a man by taking out a patent for something old might issue circulars to prevent others from selling an article which was sold years before the patent." I agree that there he can be restrained, but he can only be restrained if the statement in the circulars is not true. If he will persist in asserting it to be an infringement when the assertion is proved not to be true, I agree he can be restrained; and I think that is what the Vice-Chancellor must have intended to decide. He must have meant that an injunction will be granted where the defendant will not assert the truth of his statement either in the particular action or in another. The Vice-Chancellor does not say so, but I think that is what he must have meant—that the defendant would be restrained where the statement is untrue to his knowledge, where it is not *bonâ fide*, or where it is proved to be untrue at the time of the action at which the injunction was sought. With that modification I should agree with both the cases, but without it I do not think the cases can be sustained.

Therefore it appears to me that in the present case the Plaintiff must make out, if he wants to maintain an action for damages, that the Defendant has not been acting *bonâ fide*. If he wants an injunction, he must make out that the Defendant intends to persevere in making the representations complained of, although his allegation of infringement by the Plaintiff is untrue.

Having, then, said so much as to the law, I will now proceed to examine the statement of claim in this case, in order to see

(1) Law Rep. 18 Eq. 335.

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whether it discloses any cause of action within either of the grounds I have mentioned.

[His Lordship then read and commented on the various allegations in the statement of claim, observing in particular that the Plaintiff had nowhere alleged, or even suggested, that the Defendant had not made his statements or representations *bonâ fide*. His Lordship then continued:—]

I have read the whole of the statement of claim through almost *verbatim*, because I want to shew how clearly the whole of it is confined to the past, that there is no allegation—although I think it would have been put in if the pleader's attention had been called to this—that the Defendant intends to continue the same course of conduct, although he was aware that there had been no infringement on the part of the Plaintiff. There is, however, no such allegation; and what the Plaintiff claims is, not an injunction in the first instance—as if it were an action for an injunction with damages—but, as I understand, first of all damages, and then, at the end, there is a claim for an injunction and the costs of the action. All I can say is that, although I have seen such things in Common Law pleadings, this is not an action for an injunction: it is an action for damages. I agree, there being the claim for general relief, and the word "injunction" being there, if a case had been made out for an injunction, I should not have been deterred from granting an injunction merely by the odd way in which it was asked for; but still, in substance, it is not asked for: the substance of the action is a claim for damages. As I have said, there is no case for an injunction, even if it had been asked for; therefore it is a case of nonsuit, and accordingly I dismiss the action with costs.

Ince asked for leave to amend the statement of claim, or that the dismissal should be without prejudice to an action for an injunction.

JESSEL, M.R.:—I will dismiss the action without prejudice to your bringing an action for an injunction to restrain the Defendant from threatening the Plaintiff's customers.

Solicitors for Plaintiffs: *Sandom, Kersey, & Knight.*
Solicitors for Defendants: *Cope & Co.*

In re SIMPSON, DAVIES, & SONS' TRADE-MARK.

M. R.
1880
June 11.

Practice—Registration of Trade-Mark—Opposition to Application to register —Direction of Court, how to be obtained—Trade Marks Registration Act, 1875 (38 & 39 *Vict. c.* 91), *and Trade Mark Rules,* 1876, *rr.* 16, 44.

Where an opposed application for the registration of a trade-mark stands for the determination of the Court under rule 16 of the Trade Mark Rules, 1876, the proper course for the purpose of raising the question is for the Registrar to require the opponent to apply for a direction as to the mode of trial, whereupon the person seeking to register is usually directed to take out a summons which is adjourned into Court.

A motion on behalf of the opponents for an injunction to restrain the proposed registration is irregular, for the application to the Court referred to in rule 44 of the Trade Mark Rules, 1876, means an application by the person seeking to register.

THIS was a motion on behalf of *Arthur Higginson* and of *T. & N. Nading & Co.*, carrying on business as coalowners, who were the proprietors of a registered trade-mark, asking for a declaration that *John Simpson*, or Messrs. *Simpson, Davies, & Sons*, were not entitled to have a trade-mark, in respect of which an application for registration had been made, registered under the *Trade Marks Registration Act*, 1875, and that *John Simpson*, or Messrs. *Simpson, Davies, & Sons*, might be restrained by injunction from taking any further proceedings for the purpose of obtaining such registration, or, in the alternative, that such registration if granted might be limited by a proviso prohibiting *John Simpson*, or *Simpson, Davies, & Sons*, from using the said trade-mark upon or in connection with railway or other waggons or other vehicles containing coal sent out for the purpose of sale, and that the Respondents in either event might be ordered to pay the costs of the motion, and that leave might be given to proceed under the notice of motion and not by special case.

The opponents stated that the trade-mark sought to be registered was so like that registered as to be calculated to deceive the public.

The necessary steps of opposition had been taken in the Trade Marks Registry, and the case stood for the determination of the Court under rule 16 of the Trade Mark Rules, 1876.

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Upon counsel asking that the motion might stand over for the parties moving to put in affidavits in reply to those filed by the Respondents, it was objected on behalf of the Respondents that the present motion must in any event be dismissed, as being an incorrect method of raising the question between the parties.

Chitty, Q.C., and *Sebastian*, in support of the motion.

Aston, Q.C., and *G. E. Wright*, for the applicants for registration, raised a preliminary objection:—

The present motion cannot be entertained. The application is now ready for the decision of the Court, and the proper course is for the opponent to wait for the opponent to take proceedings. The usual course is for the opponent to obtain in Chambers the direction of the Judge as to the mode of bringing the case before the Court.

Chitty, Q.C., and *Sebastian*, *contrà*:—

To proceed by motion is usual. It was the form adopted in many similar cases: *In re Worthington & Co.'s Trade-Mark* (1); *In re Farina* (No. 1) (2); *In re Farina* (No. 2) (3); *Ex parte Barrows* (4); *In re Saunion & Co.* (5); *In re Farina* (No. 3) (6).

In all these cases the question was tried on motion by the opponent, and no objection was taken to the proceedings. This is the first instance of such an objection. We submit that a motion is a convenient way of obtaining the determination of the Court. The notice of motion also asks for leave to be given to proceed under this notice of motion and not by special case, as a double application to the Court is thereby avoided. In any event, if we are wrong in the practice, we now ask your Lordship to give a direction as to the mode in which the case shall be brought on.

[The *Trade Marks Registration Act*, 1875, and the Trade Mark Rules, 1876, rules 16, 44, were referred to.]

Jessel, M.R.:—

The Act and Rules do not give the opponent any power to take

(1) 14 Ch. D. 8.
(2) 26 W. R. 261.
(3) 27 W. R. 456.
(4) Sebastian, Dig. of Cas. No. 555.
(5) Ibid. No. 625.
(6) Ibid. No. 654.

the initiative by restraining the registration ; if he wants to get an injunction, he must commence an action in the usual way. The application to the Court, which is referred to in rule 44, is clearly an application by the persons seeking to register. The rule points out a special case as the mode in which such cases as the present are to be tried ; but the parties never in practice agree upon the facts, and the Registrar is not a lawyer, so as to be able to decide between the rival representations of the parties. The usual and proper course is for the Registrar to require the opponent to apply for a direction as to the mode of trial, upon which my usual practice is to direct the applicant who desires to register to take out a summons, which is invariably adjourned into Court. In one or two cases I have, I believe, directed a motion, but the usual course is to direct a summons. The form of the present application is irregular, and its effect is to transpose the positions of the parties, who are practically Plaintiff and Defendant; and if orders have been made on such applications hitherto, it must have been because the irregularity has not been brought under the notice of the Court. I shall direct the applicant for registration to take out a summons for leave to register, which will be adjourned into Court in the usual way. Then the motion will stand over and come on with the summons as an integral part of it, and I shall then deal with the costs. The briefs and evidence on the motion will be used on the summons.

Solicitors for Opponents: *Higginson & Vigers.*

Solicitors for Applicants: *J. Wilkinson,* agent for *Wright, Stockley, & Becket, Liverpool.*

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June 14.

In re PARKER.
BENTHAM *v.* WILSON.

[1880 P. 104.]

Will—Construction—Words—"Cousins"—"First and Second Cousins."

In construing a will, the well-defined legal meaning of a term used by the testator should not be altered unless there is something in the nature of a context to shew that it could not have been intended by the testator to have that meaning. Thus, a bequest to "first cousins," *simpliciter*, without a context, means cousins german; and a similar bequest to "second cousins" includes only second cousins strictly so called, and not persons standing in the same degree as second cousins, as, for instance, children of first cousins, or, as they are commonly called, first cousins once removed.

A testator gave one-third of all his property to his "first cousins," and two-thirds to his "second cousins." At his death the testator left first cousins, second cousins strictly so called, and also children and grandchildren of first cousins:—

Held, that the term "second cousins" did not include children or grandchildren of first cousins.

SPECIAL CASE under Rules of Court, 1875, Order XXXIV., rule 1.

John Parker, by his will dated the 28th of January, 1878, after directing the payment of his debts and funeral and testamentary expenses, disposed of "all his property" in the following terms: "Finally, my will and meaning is that my kindred should all have an equal share, for which I give my trustees full power to divide; but I give and bequeath one-third to my first cousins, and two-thirds to my second cousins."

The testator died on the 13th of February, 1878.

There were living at the testator's death some of his first cousins, some of his second cousins strictly so called; also some children of some of his first cousins, or, as they are commonly called, first cousins once removed; and also some grandchildren of some of his first cousins, or, as they are commonly called, first cousins twice removed.

The main questions were, whether the term "second cousins" in the will included children of the testator's first cousins, and

whether the same term also included grandchildren of such first cousins?

W. Barber, for the Plaintiff, one of the first cousins.

Bagshawe, Q.C., and *Wiglesworth*, for a Defendant, one of the second cousins, contended that "second cousins" meant the relations usually called second cousins, that is, those who have either the same great grandfather or the same great grandmother: *Corporation of Bridgnorth* v. *Collins* (1); *Sanderson* v. *Bayley* (2): *Stoddart* v. *Nelson* (3); *In re Blower's Trusts* (4).

Chitty, Q.C., and *Byrne*, for two Defendants, first cousins once removed, and for a Defendant, a first cousin twice removed, contended that by "second cousins" the testator meant to include all persons of the degree of second cousins: *Mayott* v. *Mayott* (5); *Silcox* v. *Bell* (6); *Charge* v. *Goodyer* (7); *Slade* v. *Fooks* (8). Though the authorities related to personal estate only, they seemed equally applicable to a will comprising real estate, as in the present case.

JESSEL, M.R.:—In considering this question I shall make no distinction between wills of real estate and personal estate.

JESSEL, M.R.:—

As I read this will, a man gave two-thirds of his property to second cousins and one-third to first cousins. It is true there are other words—"that my kindred should all have an equal share"—but that I read as meaning "as hereinafter mentioned;" for I cannot say that those words are to cause me to reject the subsequent gift.

The first question is, what does the testator mean by "first cousins?" Cousins german, primarily and without a question the term does so mean in ordinary parlance, and according to the authorities to which I shall refer presently. "Second cousins"

(1) 15 Sim. 538.
(2) 4 My. & Cr. 56.
(3) 6 D. M. & G. 68.
(4) Law Rep. 6 Ch. 351.
(5) 2 Bro. C. C. 125.
(6) 1 S. & S. 301.
(7) 3 Russ. 140.
(8) 9 Sim. 386.

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means second cousins. The term "second cousins" has a well-known definite meaning: it means persons having the same great-grandfathers and great-grandmothers. The relationship is a perfectly well-known and perfectly well-settled relationship: there never was any doubt about its meaning suggested by anybody that I am aware of. Why should the meaning of it here be altered without a context? It is one of the first principles of construction that there should be no alteration in the proper sense of words without a context: here there is no context.

But then it is said that, upon some decided cases, I am bound to alter the meaning of the words. In the first place, nothing is better settled, as regards decided cases upon the construction of wills of personal estate, than that, unless they lay down a principle, they do not govern another decision at all. In the absence of that, a Judge construing a will of personal estate is not bound to look at another decision upon another will or to look at the authorities. Therefore, unless I find a principle laid down, of course the cases do not govern me at all.

Then it is suggested that the cases lay down a principle, which principle is said to be this, that a gift to second cousins does not mean a gift to second cousins, but that it means a gift to any person or persons related to the testator in the same degree as second cousins, or in what I have called the sixth degree. I am not sure that that is the right way of calling it, but it will be understood what I mean. That being so, of course if there is a principle—if you can elevate such a statement as that into a principle—I am bound to follow it. If the House of Lords had laid it down that whenever a man put "second cousins" in his will, he did not mean second cousins, but, without a context, was to be held to mean "Every person related to me in the same degree as second cousins, whether second cousins or not," I should be bound to follow it as a principle, however extraordinary the principle might be. The question is, Is such a principle laid down?

Now, in the first place, I will look at the first case upon the subject, which, with great deference to successive counsel and successive Judges, I may say has been wholly misunderstood. The case is by no means so absurd as it looks at first sight, when you come to consider what the case actually was. The case I

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mean is *Mayott* v. *Mayott* (1). As it reads in the report it is this: a testator gave legacies to each of his nephews, and then he went on to give legacies out of stock to his first and second cousins. He left at the time of his death one first cousin, the Defendant *Thomas Mayott*, three first cousins once removed, and a great-niece. His Honour the Master of the Rolls, Lord *Kenyon*, held that they should all take, the testator's intention being to give legacies to relations not more remote than second cousins.

Now the statement of the case is much more full in *Belt's* note, and there we find two things which do not appear in the report; first of all, that the will was dated in 1782, and secondly, that the testator died a few days afterwards; so, no doubt, the same cousins were alive at the date of the death as at the date of the will. I see that the will was dated the 14th of February, 1782, and that the testator died on the 26th of February, 1782; that is to say, he died twelve days after the date of his will; it is highly probable, therefore, that the same people were living at the date of the will—and no others—as were living at his death. There can really be no doubt that that was the fact, and consequently it is the case of a man who at the date of his will had no second cousins. I will now turn to the will. At the date of the will, the testator having no second cousins, gives his legacies in this way—unto the plaintiffs, "and all his first and second cousins of the name of '*Mayott*,'" to be equally divided between them; and then he winds up with a direction that, in such distribution, "no female first or second cousins married were to have any share"; that is to say, he excludes those whose name had been "*Mayott*," but was not *Mayott* then. Now anybody reading that will can see that the testator referred to some living persons whom he knew. He makes his bequest to his first and second cousins, including the married first and second cousins; and if at the date of the will he had no second cousins, he must have meant somebody else by "second cousins"; and that is the *ratio decidendi*, namely, that he could not have used the term "second cousins" in its proper sense, but must have used it in its improper sense. The Master found this, that the testator left "only one first cousin of the name of *Mayott*, namely, the Defendant, *T. M.*, of *Ramsden Park*;

(1) 2 Bro. C. C. 125.

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and no person of the name of *Mayott* who was strictly his second cousin." So the Master found that there were no second cousins, but that the testator left "three first cousins once removed, namely, the Defendant, *T. M.*, of *Little Bursted*, the Defendant, *Mary Mayott* (then *Gardiner*), and *Susannah Mayott*, who were both unmarried at the death of the testator." From which he certified that the testator had no second cousin of the name of *Mayott* at the time of his death. That was right; the Master knew what a second cousin was, and he really so certified. Then on further directions the Court declared the personal estate to be divisible in seven equal parts among the Plaintiffs, *T. E. Mayott* and *John Mayott*, and the Defendants, *Thomas Mayott*, of *Ramsden Park*, and *T. M.*, of *Little Bursted* (a first cousin once removed); the Defendant *Mary*, the wife of *G. Gardiner* (another first cousin once removed), the Defendant *Susannah Mayott* (another first cousin once removed), and the Defendant *Mary Ann Mayott*, who was a great-niece. The Master of the Rolls decided that as the testator had no second cousins he could not mean them, but that he did mean persons who were as near of kin as second cousins. I am not sure that was right. I am not sure it would not have been better to have decided that the testator meant first cousins once removed, but the decision was founded on the fact that at the date of his will he had not any second cousins at all. Therefore he must have meant somebody else, and who that was the Court had to decide. The Court could only decide between two classes, either the persons related as nearly as second cousins, or first cousins once removed; and the Master of the Rolls decided in favour of the former view, and therefore actually held the words "second cousins" to include a great-niece. If I may respectfully say so at this distance of time, I should not have let in the great-niece. I think I should have held that "second cousins" meant first cousins once removed. On that point I should differ; on the other point I should not differ. When a man had no real second cousins at the date of his will, and evidently contemplated somebody whom he spoke of as a second cousin, first cousins once removed ought to be let in, there being no persons answering the primary description. Nothing is better settled in construction cases, where there is no person or property

exactly answering the particular description, than this, that you are at liberty to see if there is any such person or property coming near the description, as, under the particular circumstances of the case, must be taken to be the person or property, as the case may be, intended to be referred to, though inaccurately described in the will. That is all *Mayott* v. *Mayott* (1) decides.

Now I come to the two cases which I am asked to follow. The first case is *Silcox* v. *Bell* (2). The gift there was to certain relations named by the testator, "and in case there should be any other relations of his that could prove themselves, to the satisfaction of his trustees and executors, to be either the first or the second cousins to him, or the representatives of such first and second cousins, he directed that his trustees and executors should consider them as actually entitled with those whom he had particularly described, and that they should pay and distribute their respective shares," and so on: and he winds up with a direction to his trustees to divide the proceeds of sale of certain property, "amongst his several relations thereinbefore particularly named and described, and such others of his relations as should prove themselves to be his first or second cousins as aforesaid."

Now it does not appear at all from the report what relation the testator left—whether he had any first or second cousins at the date of his will; nor does it matter, because that will referred to persons not known to the testator, for he says "such other persons as should prove themselves," and so on. The decree made at the hearing of the cause, upon which we find no argument at all, left it to the Master to inquire "Whether the testator left any relations of the degree of first or second cousins, or representatives of such first or second cousins." Under what doctrine the decree left that inquiry to the Master it is impossible now to state, because we do not know whether there was any judgment delivered at all, or whether the point passed without argument. The Master made his report, and he certified "that four persons, whom he mentioned by their names, and who appeared from their pedigrees, which he stated in his report, to be the great-grandchildren of the testator's uncles and aunts, were the second cousins of the testator;" they were really first cousins twice removed. To this

(1) 2 Bro. C. C. 125. (2) 1 S. & S. 301.

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report the plaintiff *Silcox* excepted. Mr. *Horne* and Mr. *Ellison*, in support of the exception, contended that by the decree the Master was directed to inquire only who were the first and second cousins of the testator, and that the persons named in his report were neither the testator's first nor his second cousins.

Now comes the answer. Mr. *Sugden* and Mr. *Roupell*, in support of the Master's Report, argued thus: "The case of *Mayott* v. *Mayott* (1) has established that it is not material by what name the relations are designated, provided they are within the degree of relationship which the testator meant to include in his bequest." *Mayott* v. *Mayott* established no such thing. As I said before, the decision was founded on the fact that there was no such person within the designation used in the will, so that it was necessary to find some one else who must have been meant. "The Court had that in view in making the decree, because it did not refer it to the Master to inquire who were the testator's first and second cousins, but who were of the degree of first and second cousins to the testator."

I agree that the decree was wrong, but I have no doubt the statement of the supposed principle in *Mayott* v. *Mayott* was invented for the occasion. Nothing of the kind was established by it.

Then the learned Vice-Chancellor says this: "The Master is wrong in the terms of his finding, for these persons are not the testator's second cousins but his first cousins twice removed; and I must, therefore, allow the exception." This, then, is one of the cases which decided that first cousins twice removed were not second cousins; so far I agree with the authority. Then he goes on: "But as I am of opinion that all persons who are within the degrees of relationship mentioned in the will"—there being no degree of relationship mentioned in the will, but only first and second cousins—"are within the intention of the testator, I shall at the same time make a declaration that the persons named in the report are of the degree of second cousins."

Now here is a case which is, in my opinion, entirely wrong; a case in which the Vice-Chancellor was misled by a statement of counsel of eminence into considering that *Mayott* v. *Mayott* estab-

(1) 2 Bro. C. C. 125.

lished that which it did not establish; and then, supposing he was following it, he altered the will without, as far as I can see, any ground for so doing.

The next case is a very apt illustration of what happens when you follow authorities without looking at them or seeing what is the principle on which they are decided. The case is *Charge* v. *Goodyer* (1). There the will was very much like the last, although it was not quite so wide. There the bequest was to trustees "to pay and divide the same between and amongst all and every his first and second cousins, and the children of his late kinsman *George Charge*, share and share alike." *George Charge* had two children who were first cousins twice removed of the testator, being the great-grandchildren of his uncle. It was admitted that the bequest to first and second cousins, had it stood unmodified by any circumstance or expression, would have included all persons of the degree of second cousins. As an authority for that *Silcox* v. *Bell* (2) was cited as well as *Mayott* v. *Mayott* (3). *Mayott* v. *Mayott* did not so decide, but *Silcox* v. *Bell* did, and therefore it was admitted; and then it was contended that the legal construction of the words was got over because Mr. *George Charge* was mentioned as having children, and it would have been unnecessary to mention them if they were included in the first gift. Then Mr. *Sugden*, *contrà*, argued that the legal construction of the words could not be restricted by any inference drawn from the mention of the children of *George Charge*, since there was nothing to shew that the testator knew that these children were within the degree of second cousins. The Master of the Rolls was of that opinion, and made a declaration that all persons of the degree of second cousins were entitled to the benefit of the bequest. There I agree with him if it was the legal construction: the mere fact of the reference to *George Charge's* children would not have controlled it; but the point that it was the legal construction was admitted, and therefore the then Master of the Rolls gave no decision at all as to whether it was or was not so. There was the decision before him of *Silcox* v. *Bell*, and all he decided was that the reference to *George Charge's* children would not control it.

(1) 3 Russ. 140. (2) 1 S. & S. 301.
(3) 2 Bro. C. C. 125.

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Those are the three cases which are supposed to establish the principle that a gift to second cousins—because that is the first point—standing alone, means everybody in the same degree. Now, on the other hand, there is a good deal of authority the other way.

In the first place, there is a case exactly in point before Vice-Chancellor *Shadwell*, the case of the *Corporation of Bridgnorth* v. *Collins* (1). The trust there was for the "second cousins," and the Vice-Chancellor says (2): "I am bound by the words which I find in the will. Those only who have either the same great-grandfather or the same great-grandmother, are second cousins to each other." Then he says he will not be bound by the fact of the testator having made a mistake in describing second cousins. In that respect the case is on the same footing as *Charge* v. *Goodyer* (3). Then he says, "My opinion is that those only who stood in the relationships of second cousins to the testator are entitled to share in the fund." That is an authority precisely in point: "second cousins" means second cousins and nothing else.

Then there are two cases before Lord Chancellors: the first is the case of *Sanderson* v. *Bayley* (4), in which the gift was to "all my first cousins or cousins german." The Vice-Chancellor made a decree that the first cousins and the descendants of all first cousins were entitled. That was reversed, and the Lord Chancellor, Lord *Cottenham*, held that first cousins and cousins german meant the same thing; and then he went on to say that a first cousin once removed was in fact a cousin in the second degree, though not called a second cousin, as being the second class of persons to whom the appellation of cousin is given.

So he decided two things; first of all, that a first cousin meant a cousin german, and, secondly, that a first cousin once removed was not called a second cousin.

A similar point came before another Lord Chancellor, Lord *Cranworth*, in the case of *Stoddart* v. *Nelson* (5). The question there was whether "cousins," *simpliciter*, did not mean first cousins, and he held it did. But what he says is this (6): "I think that,

(1) 15 Sim. 538.
(2) Ibid. 541.
(3) 3 Russ. 140.
(4) 4 My. & Cr. 56.
(5) 6 D. M. & G. 68.
(6) Ibid. 73.

if a testator says no more than that he gives to 'cousins,' he must be taken to mean first cousins. That will be a practical construction, and one by which the parties entitled will be easily ascertained: it coincides too with ordinary experience, for when a person speaks of cousins, he generally means first cousins, the children of an uncle or aunt; and I think that, in the present case, there being first cousins, this is the proper construction to adopt." Now there Lord *Cranworth* evidently referred to what occurred in *Mayott* v. *Mayott* (1). If there had been no cousin at the date of the will he might have been inclined to think it went to second cousins, or somebody else; but there being first cousins, first cousins only take. Now I agree in the decision of *Sanderson* v. *Bayley* (2), though respect is shewn by the Lord Chancellor to a supposed principle which does not exist, but really when you come to look at that case throughout, you will see that though the Lord Chancellor discussed the cases there referred to—*Mayott* v. *Mayott*, *Silcox* v. *Bell* (3), and *Charge* v. *Goodyer* (4)—all he says about them is this (5), "It is true that there are cases in which cousins once or oftener removed have been held to take, though not specifically named." Then he mentions these three cases and says, "All these cases proceed upon the same principle, but which appears to me to be wholly inapplicable to the present. In all those cases the gift was to all the testator's first *and* second cousins, and in all, first cousins once removed were held to be entitled; but not because they were first cousins, but because they were within the degree of second cousins; and so entirely was that the reason, that in the first, Lord *Kenyon* said the intention was to give to relations not more remote than second cousins; and in the two last of those cases, first cousins twice removed were included, Sir *John Leach* declaring, in the last case, that all persons of the degree of second cousins were included."

All I can say is that the Lord Chancellor in that case does not seem to have adverted to the fact that in the case before Lord *Kenyon* there was no person to answer the description at all; and the omission to note that fact shews at once that the ground on which the case proceeded was not thoroughly understood.

(1) 2 Bro. C. C. 125.
(2) 4 My. & Cr. 56.
(3) 1 S. & S. 301.
(4) 3 Russ. 140.
(5) 4 My. & Cr. 61.

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As regards the only other case to which I wish to refer, *In re Blower's Trusts* (1), I think it shews that in modern times Courts of Appeal have kept to the true rule of construction, namely, that you are not without a context to alter the meaning of well-known terms that have a definite meaning. Every one of the Judges who decided the cases I have referred to knew that the words "second cousin" had a definite meaning, for the very reference to the degree of second cousin shews they knew what a second cousin was. The term could not have been a matter for reference to the Master at all without its having so well-defined a meaning: so that the Master must have known what it meant before he made the report: therefore the very form of the decree referring to the degree of second cousins shews that the term had a well-defined legal meaning. Accordingly, I say you have no right to alter the well-defined legal meaning of a term unless there is something in the nature of a context which shews that it could not have been intended by the testator to have that meaning. Where you find that at the date of the will the class presumed to be known to the testator and aptly described does not exist, then you call in the principle to which I have already adverted, that he must have misdescribed the class, and you endeavour to find out to what particular class of legatees the description was intended to be applied.

I therefore answer the questions in the negative, and hold that the term "second cousins" does not include either children or grandchildren of first cousins.

Solicitors: *Ridsdale, Craddock, & Ridsdale*, agents for *W. Hartley, Settle, Yorkshire.*

(1) Law Rep. 6 Ch. 351.

STEWART *v.* STEWART.

M. R.
1880
June 21.

[1875 S. 19.]

Will—Residuary Gift—Advancements to Children—Hotchpot Clause—Appointment of Executors—Codicil—Revocation of Share of Residue—Lapse—Trust—Next of Kin—Widow and Children—Application of Hotchpot Clause to lapsed Share—Interest on Advances, how chargeable—Statute of Distributions (22 & 23 *Car.* 2, *c.* 10, *s.* 5)—11 *Geo.* 4 & 1 *Will.* 4, *c.* 40.

A testator gave his residuary estate to trustees—whom he also appointed his executors—in trust for sale, and to stand possessed of the proceeds in trust for his six children, *nominatim*, in equal shares, including two sons, *F.* and *J.*: and after reciting that he had already advanced £4000 to his son *F.* and £500 to his son *J.*, he declared "that neither of my said sons, nor any of my children who shall receive from me any sum of money for their advancement in the world, shall be entitled to any part of my residuary estate without bringing the said sums of £4000 and £500, and all other sums so given to any of my said children, with interest thereon at £5 per cent. per annum from the times of advancing the same respectively, into hotchpot."

By a codicil the testator revoked the provision made by his will in favour of his son *J.*, thereby causing a lapse of *J.*'s one-sixth of the residue.

The testator died leaving his widow and his six children his next of kin:—

Held, that the codicil must be read as if it expressly declared a trust in the executors of the lapsed share of residue for the testator's wife and children according to the *Statute of Distributions*; and accordingly (reading the will and codicil as one instrument) that the hotchpot clause applied to the shares taken by the children under the codicil, but that it did not apply to the widow so as to increase her share under the codicil.

The £4000 and £500 advanced to *F.* and *J.* respectively, together with interest at 5 per cent. up to the testator's death, and interest at 4 per cent. on the aggregate amount in each case from the death, were therefore ordered to be brought into hotchpot in ascertaining their shares of residue.

In the absence of any direction by a testator to the contrary, advancements to his children on account of their portions bear no interest up to his death, but from his death they bear interest at 4 per cent.

FURTHER CONSIDERATION.

Francis Stewart, by his will dated the 20th of July, 1869, devised and bequeathed his residuary real and personal estate to his trustees—whom he had also appointed his executors—in trust for sale and conversion, and to stand possessed of the proceeds, after payment of his debts and legacies, in trust to invest the same

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as therein mentioned; and to stand possessed of the investments in trust for such of his six children *nominatim*, being four sons—two of whom were named *Francis* and *James*—and two daughters, as should attain the age of twenty-five, or die under that age leaving issue (such issue to take their parent's share) in equal shares: the shares of three of the sons to be paid to them at twenty-five, and the shares of the remaining son and the two daughters being settled. And after reciting that he had expended the sum of £4000 in favour of his said son *Francis*, and the sum of £500 in favour of his said son *James*, the testator declared "that neither of my said sons, nor any of my children who shall receive from me any sum of money for their fortune on their marriage, or for their advancement in the world, shall be entitled to any part of my residuary estate without bringing the said sums of £4000 and £500, and all other sums so given to any of my said children, with interest thereon at £5 per cent. per annum from the times of advancing the same respectively, into hotchpot."

By a codicil, dated the 28th of April, 1874, the testator revoked all the provisions made by his will in favour of his son *James* and his issue, and in lieu thereof directed his trustees to set apart a sum of £6000, and to stand possessed thereof upon trusts for the benefit of his said son, and, subject thereto, for the children of such son.

The testator died on the 3rd of October, 1874, leaving his widow and his six children him surviving. Three of the children had attained twenty-five, one had attained twenty-one but was under twenty-five, and two were infants.

In January, 1875, this action was instituted by the testator's widow against the six children, the infant children of two of them who were married, and the trustees and executors of the will, for the administration of the testator's estate, and to have the rights of the parties declared.

An administration decree was made on the 12th of April, 1876.

The action now came on upon further consideration, one of the questions being whether, the bequest in the will to *James* of one-sixth of the residue having been revoked by the codicil, and such one-sixth being therefore undisposed of, the hotchpot clause in the will applied not only to the shares of residue taken under the

will, but also to the shares taken by the testator's widow and six children, as his next of kin, in the undisposed-of sixth.

Bagshawe, Q.C., and *Caldecott*, for the Plaintiff, the widow:—

It is clear that as the residue was given to persons *nominatim*, as tenants in common, the revoked one-sixth does not fall into the residue but goes to the next of kin as undisposed of: *Sykes* v. *Sykes* (1): the executors being trustees for the next of kin: 11 Geo. 4 & 1 Will. 4, c. 40. Then the question is whether, for the purpose of ascertaining the sums divisible among the next of kin in respect of this lapsed sixth, as well as the sums divisible in respect of the five-sixths under the will, *Francis* and *James* must bring into hotchpot their advances of £4000 and £500. We submit that they ought to do so. The direction in the will operates with respect to the entire residue in whatever shape it is, as a whole, divisible, and quite irrespective of the fact that one share of it has lapsed: it cannot have only a partial operation. Although the gift of the one-sixth is revoked, the direction to bring into hotchpot is not. There is no express authority on the point, but we submit that the direction overrides the whole of the residue whether well-bequeathed or not, just as in the case of a direction for payment of debts, and funeral and testamentary expenses: *Trethewy* v. *Helyar* (2). Consequently, this hotchpot direction extends to all next of kin sharing in the residue, whether they are children or not.

Chitty, Q.C., and *A. T. Watson*, for *Francis*:—

We submit that we are only to bring the £4000 advanced to us into hotchpot for the benefit of the persons entitled to shares of residue under the will, and not so as to increase the lapsed share. It is true that under the 5th section of the *Statute of Distributions* (22 & 23 Car. 2, c. 10) advancements made by the intestate to his children in his lifetime are to be brought into account in estimating their shares under the statute: but that section only applies to the case of actual intestacy. Where there is—as here—an executor, and consequently a complete will, though the executor may be declared a trustee for the next of kin, they take as if the

(1) Law Rep. 3 Ch. 301, 303. (2) 4 Ch. D. 53.

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residue had been actually given to them: therefore, a child advanced by his father in his lifetime, or provided for in the will, cannot be called on to bring the advance or provision into hotchpot: *Walton* v. *Walton* (1).

But even if that section does apply so that this £4000 is to be brought into hotchpot so as to increase the lapsed share, it must not go to augment the widow's portion of that share, for the object of the statute and also the evident intention of the testator is, not to benefit the widow, but to make the provisions for the children equal *inter se;* therefore the widow is not entitled to have advances to the children brought into account for her benefit: *Kircudbright* v. *Kircudbright* (2); *Meinertzagen* v. *Walters* (3).

[They also referred to *Williams* on Executors (4).]

Ince, Q.C., and *Cozens-Hardy*, for *James*, took the same view.

Bagshawe, in reply:—

The one-sixth being undisposed of, recourse must be had to the *Statute of Distributions* to see who are the persons entitled to it, and under that statute the widow takes *pari passu* with the children.

Waller, Q.C., *Marten*, Q.C., *E. K. Karslake*, Q.C., *Crossley*, Q.C., *Whitehorne*, *F. G. Bagshawe*, *Armitstead*, and *Richmond*, for other parties.

JESSEL, M.R.:—

The first question I have to consider is what is the meaning of the will itself. Now one must recollect what the will was. The will gave the personalty among six children, and then it contained this clause:—[His Lordship read the hotchpot clause, and continued:—] I should say the testator had previously mentioned that he had already made advances of two sums of £4000 and £500 in favour of two of his sons.

Now, as the will then stood it must have meant that the advances were to be brought into hotchpot as among the children.

(1) 14 Ves. 324.
(2) 8 Ves. 51.
(3) Law Rep. 7 Ch. 670.
(4) 7th Ed. pp. 1475, 1498–1499.

What the testator clearly means on the will standing alone is this: "I intend my children to be equal *inter se*." There was no other gift. Then by a codicil he revokes the share of one child. He had appointed executors who were to hold the residue in trust; and the effect of the revocation was to make the executors trustees for certain persons—I will say presently for whom; and now I have to consider (those persons including children) whether the hotchpot clause in the will applies to the additional shares the children take under the codicil.

I will first of all consider for whom the executors are trustees. There being indications in this will which would have made them trustees even before the passing of the Act 11 Geo. 4 & 1 Will. 4, c. 40, under the rules of Equity, it is not necessary to consider the effect of the statute with reference to this will, though I shall have to consider it presently with reference to the general law.

For whom, then, were the executors trustees? Upon this point I have the *dictum* of Sir *William Grant*, in the case of *Walton* v. *Walton* (1), where he says this: "Where there is an executor, and consequently a complete will, though the executor may be declared a trustee for the next of kin, they take, as if the residue had been actually given to them." Then he goes on to say something about the advances in the lifetime, which I think has no application, because the law is different from what it was supposed to be in his time; which was that advancement did not apply to a share of residue. It is not quite accurate to say the executor is a trustee for the next of kin, because it never was so in Courts of Equity; he was always a trustee for the persons entitled under the *Statute of Distributions*, and though Sir *William Grant* uses the words "next of kin," that is what he means. It is a little inaccurate, but it sufficiently expresses what the law was. I do not like to impute inaccuracy to Sir *William Grant* without some authority, but I find authority in the language of the statute (11 Geo. 4 & 1 Will. 4, c. 40), which contains these words: "And Courts of Equity have so far followed the law as to hold such executors to be entitled to retain such residue for their own use, unless it appears to have been their testator's intention to exclude them from the beneficial interest therein, in which case they are

(1) 14 Ves. 324.

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held to be trustees for the person or persons (if any) who would be entitled to such estate under the *Statute of Distributions*, if the testator has died intestate." That was so. That was the accurate expression. The statute by its recital shews two things: First of all, that the trust is for the persons entitled under the *Statute of Distributions;* and, secondly, that the executors were held to be trustees for them. Trustees, perhaps, by implication; but, as Sir *William Grant* says, the effect of the implication was identically the same as if the testator had said, "I bequeath the residue of my personal estate to my trustees upon trust for the person or persons (if any) who would be entitled to such estate under the *Statute of Distributions* if I had died intestate." Now what do the words "if I had died intestate" import? Not merely the persons but the shares. It has been held over and over again that where you refer to intestacy coupled with a reference to the statute you mean not only that the persons take under the statute, but that they take the same shares as they would have taken under the statute; and, consequently, again referring to the recital I have read, I find the law of the Courts of Equity was exactly the same as if the testator had bequeathed the residue of his personal estate to his executors upon trust for the persons who would be entitled to such estate under the *Statute of Distributions*, and in the same shares as they would have taken under that statute.

So far we have the case quite clear. We have a will—or I should rather say a codicil, but it is part of the same instrument—which must be read as directing that one-sixth share of the residue is to be held by the executors for the persons entitled under the *Statute of Distributions*, and in the same shares as they would have taken under the statute.

Now I come to the general law as to advancements. Suppose a man had made a will in those terms, and that his next of kin were his children, and he afterwards made advances to his children which were treated as advancements; in that case, according to the modern authorities, inasmuch as shares of residue are liable to be adeemed by advancements, I presume—and indeed the contrary has not been argued—that though the children are described as next of kin, yet, as they are children, the rule of advancement

applies to them. It does not matter how you describe the children. A man whose name is *John Brown*, and whose son has taken the name of *Smith*, may say, "I bequeath my residue between *Thomas Smith*, of such and such a place, and *John Brown*, of another place:" if *John Brown* and *Thomas Smith* are his sons the rules of advancement apply to them. Therefore, in the case I have put the express gift to the next of kin, or the implied gift, would not prevent the operation of the rules of advancement as between the children.

Now I come to another case under the *Statute of Distributions*. In the case of a father advancements are to be taken into account as between the children. Therefore, in the case I have put, if the man had said nothing beyond what I have mentioned, the statute would have applied independently of the equitable rules as to advancements, because it applies to advancements before the date of the will: the equitable rule as to ademption applies to advancements afterwards. But if the children are to take in the same shares and in the same way as they would have taken under the statute, the statute would apply to these latter advancements too, and bring the children to a complete equality *inter se*.

I have now to construe this will. The differences between the advancements under the will and under the statute appear to be these. By the course of practice in the Court of Chancery advancements under the statute are taken without interest up to the time of the death; and from the death, inasmuch as the distribution is referred back to the actual date of death, 4 per cent. interest is allowed: that is, the child who has been advanced pays 4 per cent. from the death of the parent but not before. In that way the child gets the benefit of the interest, which otherwise would have been payable during the parent's lifetime, as between himself and the other children. Whatever the theory was does not matter much, but that is the universal practice. The theory may have been that there was a gift of the income up to the death; or it may have been that, as no interest is payable by law in the absence of contract, the Court would not send the inquiry back further than the death; but the rule is as I have stated it. This testator has made interest payable from the

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date of the advancement, and consequently it is not a statutory advancement which we must consider, but an advancement made by the testator.

Now, the first point I have to consider is this: Does the hotchpot clause apply at all to *James's* share which is revoked by the codicil? What are the words? "Neither of my sons, nor any of my children who shall receive from me any sum of money," &c., "shall be entitled to any part of my residuary estate without bringing," the said sums, "with interest thereon at £5 per cent. per annum from the time of advancing the same respectively, into hotchpot." Why should the clause not apply to *James's* share? If the codicil means, as I hold it to mean, that "my executors are to hold one-sixth of the residue in trust for my wife and children according to the *Statute of Distributions*"—for that is the effect of the codicil; one-sixth of the residue being applicable for the persons entitled under the *Statute of Distributions*, who turn out to be the wife and children—why should not the clause that none of them are to take the residuary estate without bringing into hotchpot apply? They do take the residuary estate under the will. The executors take it, and have become trustees of it by reason of the expressions in the will, which imply a trust as sufficiently as if it had been expressed. It appears to me that that clause ought to apply to the children, who take by the codicil a share as next of kin, just in the same manner as to the children who take by the will, by reason of their being expressly named. Therefore I think every child must bring his advancement into hotchpot, and that consequently *James*, who takes his distributive share by the codicil, must bring his £500 into hotchpot; and in the same way the £4000 must go against the distributive share of *Francis* under the codicil as well as against his share under the will.

Now I come to the remaining question. What did the testator mean by this direction? Did he or did he not intend it to apply further than the children? I am now reading the will in this way: "I give my residuary estate to be divided as follows: as to five-sixths among my five children equally, and as to the remaining sixth one-third of it to my widow and two-thirds to my six children." That is the effect of it. Then I have this direction

as to hotchpot originally put in the will when the objects of the gift were children only. Surely the direction has reference to the children only, and is intended for the purpose of equalising the shares of the children in effecting a division among them. Why should it apply to the widow at all, so to increase her share? It originally applied to a gift to the testator's six children. Why should I extend the meaning of the word "hotchpot" here? "Hotchpot" is used by this testator in his will with reference to a particular purpose, and now it is attempted to be applied to a case which, it appears to me, is not contemplated by him. I call to my aid the general law as expressed by Lord Justice *James* in *Meinertzagen* v. *Walters* (1) that the whole doctrine only applies to children: the object is to make children bring into account advancements. The wife is a stranger for this purpose: she does not take advancements for which she accounts, and, therefore, she is not within the meaning of the clause which is to make the children account for advancements. The clause seems to me, from its nature, to apply to children, and to children only. It appears to me to be contrary to the meaning of the will to say that the clause applies to the share of the widow; and I therefore read it merely as applying to the children *inter se* in ascertaining their shares. Consequently, in distributing the shares of residue, the £4000 and £500 must be brought into hotchpot, but not so as to increase the widow's share.

The amounts therefore to be brought into hotchpot will be the principal sums advanced and 5 per cent. interest thereon from the dates of the advances to the testator's death, and 4 per cent. interest on the aggregate from the testator's death.

Solicitors: *Van Sandau & Cumming; Nash & Field.*

(1) Law Rep. 7 Ch. 670.

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[1879 J. 40.]

Will—Direction to employ Assets in Trade—Executor or Trustee carrying on Trade—Defaulting Executor or Trustee—Trade Creditors—Lien—Indemnity—Practice—Administration Action—Creditor's Claim—Petition or Summons.

18 Ch D 97
Applied 15
22 Ch D 669

Where a trader has by his will directed his executor or trustee to carry on his trade and to employ a specific portion of the trust estate for the purpose, the rule is that, though the executor or trustee is personally liable for debts incurred by him in carrying on the trade pursuant to the will, he has the right to resort for his indemnity to the specific assets so directed to be employed, but no further; and, consequently, the creditors of the trade are entitled to stand in the place of the executor and trustee, and to claim the benefit of that right so as to obtain payment of their debts: but the rule does not apply where the executor or trustee is in default to the specific trust estate devoted to the trade: in such a case, the defaulting executor or trustee not being himself entitled to an indemnity except upon terms of making good his default, the creditors are in no better position, and are therefore not entitled to have their debts paid out of the specific assets unless the default is made good.

Adjourned summons.

Peter Johnson, by his will, dated the 27th of May, 1873, appointed the Defendant *Robinson* and another his executors: and, after making certain specific and pecuniary bequests, and directing the payment of his debts, and funeral and testamentary expenses, he directed his executors, as soon as might be after his decease, to collect, get in and receive all debts owing to him in respect of the business of a tailor and robe-maker then carried on by him at *Cambridge*, and also all other debts owing to him not connected with the business then carried on by him in *London* in partnership with *Thomas Sadler*, and (subject to the provisions thereinafter contained) to sell and convert into money all his *Cambridge* stock-in-trade, and stand possessed of the proceeds, and all other his personal estate and effects whatsoever (except his share and interest in the *London* business) not thereinbefore specifically bequeathed, upon trust to pay one equal fourth part

thereof to and amongst such of the children of his deceased sister *Catherine Neill* (including his nephew *John Neill*) as should be living at the time of his decease; one other equal fourth part to the Plaintiff; and the remaining two fourth parts to the several persons therein named. And the testator declared that in case his nephew *John Neill* should be under the age of twenty-one years at the time of his decease, it should be lawful for his said executors, upon the request of the said *John Neill*, to postpone the sale of his *Cambridge* stock-in-trade and allow his said business of a tailor and robe-maker at *Cambridge* to be carried on by the said *John Neill* for his own benefit under the supervision of his said executors until such time as the said *John Neill* should attain twenty-one, and during such period should use such part of the share of the said *John Neill* in his residuary personal estate as might be requisite for the due carrying on of the said business. And he directed, in case that provision was carried into effect, that an inventory and valuation of all his stock-in-trade at *Cambridge* should be taken immediately after his decease, and that on the said *John Neill* attaining his age of twenty-one years he should have the option of taking the then existing stock at the amount of such valuation, and that if he declined to do so, and the said stock was sold, then the said *John Neill* should bring the amount of the proceeds of such sale into hotchpot on the calculation for the distribution of the residuary personal estate. The testator then gave certain directions as to the winding-up of his partnership in the *London* business, and directed that his share and interest therein should fall into his residuary personal estate.

The testator died on the 25th of November, 1875, and his will was proved by the Defendant *Robinson* alone, the other executor having renounced. There were living at the testator's death two children of his deceased sister *Catherine*, one of whom was the said *John Neill*, then an infant.

After the testator s death the Defendant did not get in the book debts of the *Cambridge* business as directed by the will, but he continued to carry on the business in his own name until the 30th of June, 1878, when *John Neill* attained twenty-one: he also continued the management of the testator's share in the

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London business. For the purpose of carrying on the *Cambridge* business, the Defendant advanced from time to time several sums of money out of *John Neill's* share in the testator's personal estate, which sums were repaid out of the business in the ordinary course of carrying it on, but the Defendant kept no separate banking account for the business.

An action having been instituted by one of the residuary legatees, and a judgment obtained for the administration of the testator's estate, it was found, on taking the Defendant's accounts, that there was due from him a balance of £764 16*s.* 1*d.* in respect of profits from the *Cambridge* business, and also a balance of £1668 3*s.* 1*d.* in respect of the general personal estate of the testator, including his share in the *London* business.

Amongst the creditors who made claims against the estate under the judgment were several persons who had supplied the Defendant with goods in the course of his carrying on the *Cambridge* business subsequently to the testator's death, but these claims being disallowed by the Chief Clerk, summonses were taken out by three of these creditors for the purpose of establishing their claims. One of the summonses was by a firm of *Standen & Co.*, woollen warehousemen, and asked that a sum of £460 5*s.* 10*d.* due to them for goods sold and delivered to the Defendant, the executor, in the course of his carrying on the trade or business of a tailor from the time of the testator's death down to the 30th of June, 1878, might be forthwith paid to them by the said executor out of the share of the said *John Neill* in the testator's residuary personal estate; or otherwise that it might be declared that the applicants were entitled to a lien on the portion of the estate of the said testator which on the 30th of June, 1878, was embarked in the carrying on as aforesaid of the said testator's business; and that an inquiry might be directed for the purpose of ascertaining what were the assets of the said testator which were so subject to the lien of the applicants.

The two other summonses, which were by creditors for an aggregate amount of upwards of £600, asked that they might be at liberty to bring in their claims against the assets of the business carried on by the Defendant under the powers of the will, in respect of debts incurred by him to the applicants in the course

of such business, and that such assets might be applied in payment of what should be found due to the applicants in respect of their debts. Upon the further consideration of the action all three summonses came on for hearing.

It appeared that the Defendant, the executor, was insolvent.

Grosvenor Woods, for Messrs. *Standen's* summons:—

I submit that the assets of the testator are liable to our debt to the extent of, if not the whole residue, at least one-eighth thereof, that being the portion of assets which the testator directed to be employed in the business: *Ex parte Garland* (1); *Cutbush* v. *Cutbush* (2); *Owen* v. *Delamere* (3); *Fairland* v. *Percy* (4). The principle is that, though the executor is personally liable for debts contracted in carrying on the business pursuant to his testator's directions, he is entitled to indemnity in respect thereof out of the estate of the deceased: consequently the assets directed by the testator to be employed in carrying on the business are liable to make good the debts contracted during their employment: *Lindley* on Partnership (5); *Ex parte Edmonds* (6). As the business has been carried on for the benefit of *Neill*, he ought not to take any part of his eighth share without first satisfying our debt.

[*Farhall* v. *Farhall* (7) was also referred to.]

Speed and *Maidlow*, for the other two summonses, took the same view.

R. F. Norton, for *Neill*, was not called upon.

E. W. Byrne, for the Plaintiff.

Seward Brice, and *E. C. Austin*, for other parties.

The Defendant did not appear by counsel.

JESSEL, M.R.—

I shall dismiss these summonses, but I will give the creditors

(1) 10 Ves. 110.
(2) 1 Beav. 184.
(3) Law Rep. 15 Eq. 134.
(4) Law Rep. 3 P. & M. 217.
(5) 3rd Ed. p. 1103.
(6) 4 D. F. & J. 488, 498.
(7) Law Rep. 7 Ch. 123.

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liberty to present a petition. I will not distribute the assets until they have presented a petition: that seems to me the regular course, but at present I do not see that they are entitled to anything. That seems to have been the course taken in several cases, and I think it is the right course, for the creditors are not parties to this suit at all. They ought to come in under a petition. With regard to the point that has been argued, I understand the doctrine to be this, that where a trustee is authorized by a testator, or by a settlor—for it makes no difference—to carry on a business with certain funds which he gives to the trustee for that purpose, the creditor who trusts the executor has a right to say, "I had the personal liability of the man I trusted, and I have also a right to be put in his place against the assets;" that is, I have a right to the benefit of indemnity or lien which he has against the assets devoted to the purposes of the trade." The first right is his general right by contract, because he trusted the trustee or executor: he has a personal right to sue him and to get judgment and make him a bankrupt. The second right is a mere corollary to those numerous cases in Equity in which persons are allowed to follow trust assets. The trust assets having been devoted to carrying on the trade, it would not be right that the *cestui que trust* should get the benefit of the trade without paying the liabilities; therefore the Court says to him, You shall not set up a trustee who may be a man of straw, and make him a bankrupt to avoid the responsibility of the assets for carrying on the trade: the Court puts the creditor, so to speak, as I understand it, in the place of the trustee. But if the trustee has wronged the trust estate, that is, if he has taken money out of the assets more than sufficient to pay the debts, and instead of applying them to the payment of the debts has put them into his own pocket, then it appears to me there is no such equity, because the *cestuis que trust* are not taking the benefit. The trustee having pocketed the money, the title of the creditor, so to speak, to be put in the place of the trustee, is a title to get nothing, because nothing is due to the trustee. It does not appear to me that in that case the creditor, who has never contracted for anything, who has only got the benefit of this equity, if I may say so, by means of the trustee, through the lucky acci-

dent of there being a trust, ought to be put in a better position than any other creditor. I do not see that any Judge has said so.

If we start with *Ex parte Garland*, what Lord *Eldon* says is this (1): "It is admitted, they [the creditors] have the whole fund that is embarked in the trade"—that is, as between themselves and the executors the creditors can claim the application of the fund—"And in addition they have the personal responsibility of the individual with whom they deal: the only security in ordinary transactions of debtor and creditor." [His Lordship then read down to the words "security for the creditors on the trade" (2), and continued:—] Then (3), after expressing his strong opinion that only the property declared to be embarked in the trade should be answerable to the creditors of the trade, he says, "If I am not bound by decision, the convenience of mankind requires me to hold, that the creditors of the trade, as such, have not a claim against the distributed assets, in the hands of third persons under the direction of the same will, which has authorized the trade to be carried on for the benefit of other persons." That does not decide the point I have mentioned at all. All that it decides is that the claim of the creditors is limited to the assets devoted to trade. What their right against those assets is, Lord *Eldon* does not decide.

Then we have a case which I think comes nearest to the present case, *Ex parte Edmonds* (4). Lord Justice *Turner* says this (5): "The case of *Ex parte Garland* and the other cases referred to in the argument have not, in my opinion, any application to the present case. They proceed upon the principle that the executor or trustee directed to carry on the business having the right to resort for his indemnity to the assets directed to be employed in carrying it on, the creditors of the trade are entitled to the benefit of that right, and thus become creditors of the fund to which the executor or trustee has a right to resort."

Having read those two authorities, which, being the decisions of a Lord Chancellor and of the Court of Appeal in Chancery, would be binding on me, I need only say that I do not think the

(1) 10 Ves. 120.
(2) Ibid. 121.
(3) 10 Ves. 122.
(4) 4 D. F. & J. 488.
(5) 4 D. F. & J. 498.

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point arises in any of the subsequent cases, or was the subject of consideration in them. *Owen* v. *Delamere* (1), which contains a mere *dictum* of Vice-Chancellor *Bacon*, but still of course entitled to great respect, if it did differ—which I do not think it does—from what Lord Justice *Turner* laid down in *Ex parte Edmonds* (2) as the true principle, would not be binding upon me; but I do not think it is different, because Vice-Chancellor *Bacon* is directing his attention to the point decided in *Ex parte Garland* (3), that is, that the creditors have no right to go beyond assets devoted to trade. The nature of the right as against those assets is not adverted to: that is plain: for after saying that *Ex parte Garland* "contains a clear, distinct, and luminous exposition of law on the subject"—which it does upon the point that it is not the general estate of the testator which is liable, but only so much as he has authorized to be employed in the business—the Vice-Chancellor says (4), "The Court will give effect to the trust which has been created by the testator, and will keep separate and applicable only to purposes of the trust that estate which the testator designated and directed to be employed for that purpose." It is merely repeating *Ex parte Garland* without the slightest reference to the mode in which the claim is to be enforced.

The same may be said of the case of *Fairland* v. *Percy* (5). I dispose of that by saying that Sir *James Hannen* goes no further, and that he does not consider the second point at all.

The question raised by the second point—that is, what is the right to resort—is not treated of, as far as I can see, in any reported decision except in the case of *Ex parte Edmonds*. I think it is inferentially referred to in Mr. Justice *Lindley's* book, where I think he means to say the same that Lord Justice *Turner* said, although I must say, with great deference to Mr. Justice *Lindley*, it might have been more clearly put. Nothing can be clearer than the way in which Lord Justice *Turner* puts it; it is simply, as he says, the right to resort for indemnity to the assets actually directed to be employed; and the creditor is entitled to the benefit of that right.

(1) Law Rep. 15 Eq. 134.
(2) 4 D. F. & J. 488.
(3) 10 Ves. 110.
(4) Law Rep. 15 Eq. 139.
(5) Law Rep. 3 P. & M. 217.

What Mr. Justice *Lindley* says is this (1):—[His Lordship then read the passage commencing "If an executor of a deceased partner," and ending "lien on the assets of the deceased employed therein," and continued:—]

I am not sure that Mr. Justice *Lindley* had in view the remarks of Lord Justice *Turner* in *Ex parte Edmonds* (2), for he does not cite the case; but he may have arrived at the same conclusion independently.

The only other text-book that I have been looking at on this point is the last edition of *Williams* on Executors (3). After stating that a trade is not transmissible, but is put an end to by the death of the trader, it says, "Executors, therefore, have no authority in law to carry on the trade of their testator, and if they do so, unless under the protection of the Court of Chancery, they run great risk, even although the will contains a direction that they should continue the business of the deceased." Then it says (4), "The testator may, by his will, qualify the power of his executor to carry on trade, and limit it to a specific part of the assets, which he may sever from the general mass of his property for that purpose; and then in the event of the bankruptcy of the executor, the rest of the assets will not be affected by the commission, although the whole of the executor's private property will be subject to its operation." Although the author cites *Ex parte Garland* (5), he does not appear to me to deal directly with the question I have to deal with, which is, What is the nature of the right of the creditors against the assets specifically appropriated by the testator for the purpose of carrying on the trade? I am therefore really thrown back on the authority of Lord Justice *Turner*. If the right of the creditors is, as is stated by Lord Justice *Turner*, the right to put themselves, so to speak, in the place of a trustee, who is entitled to an indemnity, of course, if the trustee is not entitled, except on terms to make good a loss to the trust estate, the creditors cannot have a better right. They do get some additional benefit so as to avoid a supposed injustice; but the injustice to be avoided is the injustice of the *cestui que trust* walking

(1) *Lindley* on Partnership, 3rd Ed. p. 1103.
(2) 4 D. F. & J. 488.
(3) 8th Ed. p. 1798.
(4) Page 1800.
(5) 10 Ves. 110.

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off with the assets which have been earned by the use of the property of the creditor: but where the *cestui que trust* does not get that benefit, there is no injustice as between him and the creditors, and there is no reason for the Court interfering at the instance of the creditors to give them a larger right than that they bargained for, namely, their personal right against the trustee. It appears to me, therefore, that if the trustee has no such right in such a case, they have none here.

The particular case before me is peculiar. It appears by the evidence, and it is the fact, that the executor carried on the *Cambridge* business in his own name and not in the name of the infant, which was strictly in accordance with the terms of the will, for I do not suppose he could carry it on in any other way. By the will the testator allowed him to make use of one-eighth of the residue for the purpose of carrying on the business on behalf of the legatee, who was an infant of the name of *Neill*, during his minority; then *Neill*, on his attaining twenty-one, was to be allowed to take the stock-in-trade, if he thought fit, not at its then value, but at its value at the testator's death, and all the rest fell into residue. But the executor and trustee did not follow the will, for, as I said before, he carried on business in his own name as executor, and used the assets then in the business. He did not do what the testator told him to do, namely, collect the book debts and throw them into general residue with the business, and then make use of one-eighth of the residue; he kept no separate banking account so as to shew the actual sums of money used in the business, but he carried on the business as it had been carried on before. Whether that makes any difference or not it is immaterial now to inquire, but that is what he actually did. He carried on the business, and in carrying it on he received £764 16*s.* 1*d.* more profits than he has accounted for, and this amount he owes the estate. Besides that he was carrying on the *London* business belonging to the estate. From that and other sources he has received £1668 3*s.* 1*d.* more than he has accounted for; so that he is a very large defaulter. It is manifest that he could not take one penny out of this estate by way of indemnity until he made good his default.

Therefore unless the creditors can be in a position to shew—

as to which there is no evidence before me—that there were profits from carrying on the business to an amount exceeding the deficit, so that something was gained by the use of these assets, it does not appear to me that they can be entitled to anything.

As the facts on this point do not appear, I will give the creditors liberty to present a petition within a limited time, if they think they can support it, and I will not allow the assets to be distributed until they have had time to present their petition. I do not think it is a case to make the creditors pay costs.

The summonses are, therefore, dismissed without costs.

Solicitors: *Dod & Longstaffe; Ward, Mills, Witham, & Lambert; Peacock & Goddard; Thomson, Son, & Brooks; Lindsay, Mason, & Greenfield; Ramsden & Austin; Risley & Stoker; Goldberg & Langdon.*

In re SAVAGE.

Practice — Costs — Petition presented without Authority of co-Petitioner — Amendment of Order—Rules of Court, 1875, *Order* XLI. *a.*

A petition for the appointment of new trustees and a vesting order was presented in the names of several co-Petitioners, and an order made. Upwards of a year afterwards an application was made to the Court by persons who had been joined as co-Petitioners that the order might be rescinded on the ground that they had only recently heard of the petition, which was in no way authorized by them:—

Held, that the order made could not be rescinded by the Court, but should be amended by striking out the names of the applicants as co-Petitioners, and treating them as not having been served with the petition.

Where a solicitor acts without authority, he must, as a general rule, pay the costs thereby occasioned.

THIS was a motion asking that an order made on the 24th of July, 1879, and all proceedings thereunder, might be set aside or rescinded on the ground that such order was not made, as it was purported to have been made, on the petition of the applicants; and it was also asked that the other Petitioners in such petition, or some of them or their solicitors, might be ordered to pay the costs of and incidental to the said petition and order, and of the present application.

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The order in question was for the appointment of *H. Wyatt* and *P. D. Brown* as trustees of the will of *Henry Savage*, deceased, and for vesting the property of the testator, including certain houses devised by him for sale, in the same persons upon the trusts of the will, which were for the distribution of the testator's property after the death of his widow amongst certain issue therein named.

The petition was presented in the names of several beneficiaries under the will, and all the others were made Respondents, except one, who had died without leaving any personal representatives.

The present applicants, *John Burdett* and *Emma Maria* his wife, had been joined as co-Petitioners under the names of *John Smith* and *Emma Maria Smith*, being the names they had assumed for their private purposes at the date of the petition.

Wyatt and *Brown* had recently sold a portion of the property, and the applicants now contended that the order appointing them trustees should be set aside on the ground that they had never given any authority to any solicitor to join them as co-Petitioners, and that they had never heard of the matter until within a few days previously to the present application. The applicants had filed in support of their application an affidavit containing, as the Respondents alleged, irrelevant and improper statements. The solicitor who had the conduct of the petition by his affidavit stated that he had the assurance of the other parties that the applicants were willing to concur in the appointment of the new trustees, and that, as the value of the property was very small, he allowed their names to appear in the petition. As evidence of their knowledge of the presentation of the petition, he produced correspondence between them and the other parties, and put in answers by the applicants, written pending the preparation of the petition, in answer to questions by him concerning the deaths and burials of certain persons interested in the property.

Oswald, in support of the motion :—

The applicants are entitled to have the order rescinded, as they are not to be affected by an order of which they had no notice, and which did not correctly state the names of the alleged co-Petitioners. The solicitor should have had a written retainer

from the applicants; therefore the onus is upon him to shew that he had any authority at all, and if he cannot shew this, he must in any event pay the costs of this application.

Herbert Lake, for the Respondents:—

It is too late now to rescind the order. Moreover, it was proper and necessary. Although the solicitor had no written retainer, yet the acts of the applicants in supplying the information for the preparation of the petition were tantamount to acquiescence, so as to render a written authority unnecessary: *Tabbernor* v. *Tabbernor* (1).

JESSEL, M.R.:—

This application is a very uncommon one, and I am glad that it is so. It is an application to rescind an order upon a petition made so long ago as the 24th of July, 1879, on the ground that two of the Petitioners did not authorize the solicitor to use their names. I do not think that there was any authority given. The solicitor got the authority of all the Petitioners except the present applicants, who at the date of the petition went by the name of *Smith;* but he did not even see them on the matter; all he says is that he had the assurance of the other parties that the applicants were willing to concur; but he does not say that he had any retainer from them, although it does appear that he could have obtained their address, and would therefore have had no difficulty in writing to them by post, and then, if they had refused to join as Petitioners, he might have made them Respondents. He did not write, but preferred to make them co-Petitioners, in order that expense might be saved.

Now, the question is, what ought I do? The application is to discharge the order and make the solicitor pay the costs. I have here to mention that an affidavit has been filed which ought never to have been made, being an improper attack on one of the solicitors concerned, and which enters into matters which are wholly irrelevant, and have nothing whatever to do with the matters in hand. I am glad to see that the gentleman attacked has not answered this affidavit.

(1) 2 Keen, 679.

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In the first place, the order is more than a year old, and I very much doubt whether I have any jurisdiction to rescind it. If it had been an order obtained on the petition of a single person without authority, it might, no doubt, be set aside by me on an application like this; but here there are a number of Petitioners, and I have no jurisdiction, because the petition is supported by a number of persons; nor, indeed, has the Court of Appeal, without giving special leave. Then as to the facts of the present case. We have an application by one of eight persons interested in the property. Six of those persons gave authority to the solicitor to present the petition, and the seventh share belonged to representatives of a deceased person who had no legal representatives, and, therefore, could give no authority. Under the circumstances the order to appoint new trustees was quite right, and therefore the order I shall make, if I have power to amend, will be to amend by striking out the name of the Petitioners Mr. and Mrs. *Smith*, and treating them as Respondents, or rather as not having been served at all. And although I have some doubt as to the jurisdiction, yet, having regard to the rule that the Court should see its record properly kept, and also looking at the new Order (Rules of Court, Order XLI. a.), I shall make an order in that way. On the other point—of costs—I have no hesitation in saying that, as a general rule, the solicitor who acts like this without authority should be made to pay the costs, but under the circumstances I shall give the applicants here no costs, for they should never have filed this affidavit containing all these improper imputations, but the solicitor must pay his own costs and those of the other Respondents, to punish him for not having obtained the proper retainer.

Solicitor for Applicant: *E. Kimber.*
Solicitors for Respondent: *Munns & Longden.*

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JACSON *v.* GOVERNORS OF QUEEN ANNE'S BOUNTY.

[1878 H. 189.]

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July 19.

Police Rates, Charge on—Interest in Land—Pure or Impure Personalty—2 & 3 Vict. c. 93—3 & 4 Vict. c. 88; 7 & 8 Vict. c. 33.

A sum of money borrowed by justices of the peace under and for the purposes of the Acts 2 & 3 Vict. c. 93 and 3 & 4 Vict. c. 88, and charged by them, by a bond or instrument of charge, upon the police rates of a division of a county, is, having regard to the Act 7 & 8 Vict. c. 73, pure personalty.

SUMMONS to vary Chief Clerk's certificate.

Edmund Robert Harris, who died on the 27th of May, 1877, by his will, dated the 1st of December, 1876, after bequeathing various charitable and other legacies, gave the residue of his personal estate, including chattels real, to the Defendants, the Governors of Queen *Anne's* Bounty, for the uses and purposes of that charity.

On the 20th of July, 1878, an order was made in the above action for the administration of the testator's estate, an inquiry being directed of what particulars the testator's personal estate consisted at the time of his death, distinguishing such parts thereof as arose from or were connected with land from the other parts of his personal estate.

In answer to this inquiry the Chief Clerk certified that the testator's personal estate at the time of his death consisted of the particulars set forth in the first and second parts of the third schedule to the certificate.

The first part of this schedule purported to comprise personal estate "which arose from or was connected with land," and the second part personal estate "other than that which arose from or was connected with land."

The second part contained the following items: "5. £400 balance remaining due on a bond from the justices of *Lancaster* secured on the police rates of *Lonsdale North.* 6. £200 remaining

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due on a bond on the police rates of the Division of *Bury*. 7. £600 due on a bond on the police rates of *Higher Blackburn*."

This was a summons—heard upon the further consideration of the action—by the Defendants, the Governors of Queen *Anne's* Bounty, to vary the Chief Clerk's certificate by transferring the items 5, 6, and 7, in the second part of the third schedule, to the first part of the same schedule, on the ground that those items were impure personalty.

The "bonds" referred to in the certificate were all in the same form, that relating to the Division of *Lonsdale North* being shortly as follows: It purported to be made at the annual general session of the peace held by adjournment at *Preston* on the 27th of June, 1872; and after reciting the statute 2 & 3 Vict. c. 93, by which provisions were made for the appointment of constables; and the statute 3 & 4 Vict. c. 88, by which it was enacted that it should be lawful for the justices in general or quarter sessions assembled of any county in which constables should be appointed under the former Act to provide station-houses and strong-rooms as therein mentioned, and for that purpose to purchase and hold lands belonging to the county, and that the expense of building, or otherwise providing, repairing, and finishing such station-houses and strong-rooms should be defrayed out of the police rates, and that it should be lawful for such justices to borrow money for the purposes aforesaid, and to charge the future police rates with the amount of the loan and interest: and also reciting resolutions of the justices in annual general session for the purchase of plots of land for the purposes of adding to and completing a court-house then being erected, and for the borrowing of a sum of £800 for the purposes aforesaid with interest upon the security of the police rates of the Division of *Lonsdale North:* and also reciting the agreement for the loan by one *Thomas Harris*, the testator's predecessor in title: The justices assembled in annual general session in exercise of the powers of the said statutes, and in consideration of the sum of £800 advanced by the said *Thomas Harris*, "did thereby charge the future police rates of the Division of *Lonsdale North* with the amount of the said loan with interest thereon after the rate of £4 10*s.* per cent. per annum"; the principal sum to be repaid by eight yearly instalments: And the

same justices "did thereby, so far as they lawfully could, direct and order such payments to be made out of the said police rates."

This instrument was executed by three justices.

Davey, Q.C., and *Speed*, for the summons:—

These bonds are impure personalty as being a charge on land.

The Act 3 & 4 Vict. c. 88, enacts (s. 4) that in order to defray the expenses of putting the Act 2 & 3 Vict. c. 93 into execution, the justices are to make a police rate, and for that purpose to assess and tax the district according to the value of the lands liable to the county rate: and (s. 5) that the police rate is to be levied with the county rate; and (s. 8) that in default of payment the justices are to levy the amount on the land.

[JESSEL, M.R.:—That might have been so before the Act 7 & 8 Vict. c. 33 was passed; but under that Act the justices no longer have power to levy a rate themselves: they now issue a precept to the guardians of the unions for the payment of the amount required for police rates.]

Finch v. *Squire* (1) is a distinct authority that money secured on poor rates and county rates—and therefore it would seem on police rates also—is a charge on land; and *Thornton* v. *Kempson* (2) is an authority to the same effect.

In *Alexander* v. *Brame* (3) a charge on dock dues was also held to be an interest in land.

Chitty, Q.C., and *Whitehorne*, for the Plaintiffs, the executors and trustees of the will:—

The only authority at all against us is *Finch* v. *Squire*, and that case must be taken to be now overruled by the recent case of *Attree* v. *Hawe* (4).

[They were stopped by the Court.]

JESSEL, M.R.:—

I think that, looking at the decision in *Attree* v. *Hawe*, it is impossible now to say that these bonds are not pure personal estate.

(1) 10 Ves. 41.
(2) Kay, 592.
(3) 30 Beav. 153.
(4) 9 Ch. D. 337.

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It appears to me that *Attree* v. *Hawe* (1) decides that, in order to create an interest in land, the land must be affected directly.

Now, how does the matter stand? The bond is given by the justices secured on the police rates as such. By the Act 7 & 8 Vict. c. 33, the police rates are no longer leviable by the justices. The machinery under that Act now is for the justices to issue a precept to the guardians of the union calling upon them to pay the police rate which the justices have made: then the guardians are to raise the money by a rate. Therefore the justices no longer have a direct right to levy a police rate at all.

Again, if the guardians do not pay, the justices issue a warrant to the overseers of the poor, who are personally liable to pay; and the overseers may reimburse themselves by a rate. If any overseer fails to pay, he may be summoned before a justice of the peace, who may by warrant order that his goods may be distrained upon.

Thus, in no way can the justices pledge anything more than what comes into their hands as money. It is a sum which they receive from other persons, who certainly have the power to levy rates; but there is no direct charge upon the rates, if I may say so. All the justices can charge, and all they do charge, under the name of a county or police rate, is the sum of money which will come into their hands from the guardians of the poor. It is, therefore, directly within the reasoning of the second part of the judgment of Vice-Chancellor *Wood* in *Thornton* v. *Kempson* (2). The Vice-Chancellor there says, "It is said, that these mortgages are by assignment of the rates when collected; and that the commissioners are the persons to collect them, and must be taken to have them in their hands in the shape of money at the time of the mortgage, and thus the mortgagee cannot have an interest in property in the nature of a charge affecting the land itself, but only affecting the money so in the hands of the commissioners. But I do not think that view to be correct."

Then the Vice-Chancellor goes into a train of reasoning which shews that if he had thought that view to be correct he would have decided the other way. He goes on to shew that the commissioners did assign the right of collecting, but in the case I have

(1) 9 Ch. D. 337. (2) Kay, 592, 599.

before me the justices cannot make such an assignment, for they cannot themselves collect from the land in any shape or way: they can only compel the guardians or overseers to reimburse themselves by making a rate. So upon this ground such a bond as we have here is a mere charge by persons not having the remotest possible connection with the land.

Now, assuming that the case of *Attree* v. *Hawe* (1) went a step further, I must say that it appears to me that that case, overruling, as it did, *Ashton* v. *Lord Langdale* (2), would, upon the same principle, overrule *Finch* v. *Squire* (3): but it is not necessary for me to go so far as that, because the doctrine of *Finch* v. *Squire* was that, inasmuch as the rates were chargeable in respect of the ownership of the land and could be levied by distress, they were like rent. But of course that does not apply to the case before me, where, however remotely the persons who are ultimately responsible are so in respect of the land, the parties who charge the rates never can recover anything in respect of the land. They have nothing whatever to do with the land: they can only call on other persons to pay.

It appears to me, therefore, both upon principle and authority, taking the second part of Vice-Chancellor *Wood's* judgment in *Thornton* v. *Kempson* (4) to be an authority for this purpose, that these bonds are not impure personalty.

I therefore dismiss the summons.

Solicitors: *S. Dunning; Norris, Allens, & Carter.*

(1) 9 Ch. D. 337.
(2) 4 De G. & Sm. 402.
(3) 10 Ves. 41.
(4) Kay, 592.

V.-C. M.
1880
June 24.

MOORE *v.* DIXON.

[1877 M. 209.]

Settlement—Appointed and unappointed Shares—Costs to be borne rateably.

By the exercise of the usual power of appointment in a marriage settlement the shares of children were appointed unequally, but were equalized, or nearly so, by a division of the unappointed property under a hotchpot clause:—

Held, that the costs of an action to administer the trusts of the settlement must be paid rateably out of the appointed and unappointed shares.

THIS action was instituted for the administration of the trusts of a settlement dated the 31st of August, 1832, made upon the marriage of *Robert Gun Cunninghame* and *Annabella Erina Perry*, by which five several policies of assurance upon the life of *Robert G. Cunninghame*, amounting in the whole to the sum of £20,000, were assigned to trustees to pay the interest thereof to the wife for life, and after her decease upon trust for all and every or such one or more of the children of the marriage as *R. G. Cunninghame* and his wife should jointly appoint, and in default, as the survivor of them should by deed or will appoint, and in default of appointment upon trust for the children equally; and the settlement contained a hotchpot clause providing that none of the children of the marriage who should take any share of the trust moneys by virtue of any appointment should take any share in the unappointed part thereof, until each of the others of the children should have received out of the unappointed part an equal share of the trust moneys.

There was issue of the marriage four children only, namely, *Edmund* (since deceased), *Nina* (also deceased), *Eva*, and *Glencairn*. Mrs. *Cunninghame* died in 1860.

By a deed poll subsequently executed by *Robert G. Cunninghame*, he appointed the £20,000 life policies amongst the four children of the marriage in the following proportions: To *Edmund*, £5700; to *Nina*, £5000; to *Eva*, £5000; and to *Glencairn*, £4300; and by the deed it was provided that nothing therein

contained should be taken to extend to an appointment of any accumulations or bonuses on the policies therein mentioned.

Robert G. Cunninghame died in June, 1877. The unappointed fund amounted to about £2600.

A decree was made in the action in March, 1878, referring the matter to Chambers to take the necessary accounts, and on the 24th of July, 1879, an order was made on further consideration dividing £20,000 amongst the parties entitled, the residue of the fund being ordered to be carried over to a separate account "for costs and future division;" and the case was referred back to Chambers to ascertain the proportions in which the costs of this action were to be borne.

The Chief Clerk then decided that the whole of the costs, amounting to about £843, must be paid out of the unappointed funds, and this decision was affirmed by the Vice-Chancellor in Chambers.

The case now came on upon motion that the order pronounced by the Vice-Chancellor in Chambers might be discharged, and that in lieu thereof it might be ordered that the costs of this action ought to be borne and paid *pro ratâ* out of the appointed and unappointed funds, subject to the trusts of the settlement of the 31st of August, 1832, and that such consequential directions might be given with regard to the division of the funds in Court as might be necessary.

J. Pearson, Q.C., and *Warmington*, for the motion:—

The effect of throwing all the costs upon the unappointed fund would be that *Edmund's* share, which is the largest of all, would not have to pay any portion of the costs of this action. This is an action for the general administration of the trusts of the settlement, and the costs ought in such a case to be apportioned rateably between the appointed and unappointed fund. There is no residue in reality out of which the costs can be paid, since in effect the whole of the unappointed fund will be divided amongst all the children other than the eldest son, unless the amount of such unappointed moneys might be more than sufficient to make up their shares to the amount of the sum appointed to him, in which event he would come in and share with them the remainder

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of the amount. There is no analogy between the residue of a testator's estate taken under a will and an unappointed fund to which the parties named in a settlement are entitled; and the parties entitled in default of appointment are just as much the objects of bounty as those who take by virtue of the appointment, and an appointment must be regarded not only as a gift to the appointee, but also as a divesting of what would otherwise go to those entitled in default of appointment. This view was taken by Vice-Chancellor *Knight Bruce* in *Warren* v. *Postlethwaite* (1) and *Trollope* v. *Routledge* (2), and the Vice-Chancellor, in his judgment in the latter case, says that the rule that costs should fall upon the residuary estate had not been applied to appointments, and he directed the costs to be apportioned according to the amounts of the appointed and unappointed parts of the funds, and to be borne by those parts respectively according to their amounts.

Glasse, Q.C., and *Nalder*, for the eldest son:—

The intention in this case was to give a larger share of the fund to the eldest son, but the proposal to throw the costs on all the shares equally will do away with that intention, while, if the costs are paid out of the unappointed fund, the eldest son will still have something over the amount received by the younger children, and the proportion will be better preserved.

MALINS, V.C.:—

The point is a nice one, and fairly open to argument. The question is whether the unappointed and appointed parts should bear the costs rateably. The only point raised in Chambers was whether the unappointed part should bear the whole costs. The question arises under a settlement made in 1832, by which settlement £20,000 was assigned to trustees upon trust after the life estate for the children as the parents should appoint, and in default of appointment, then equally among the children. Therefore the object is that the children should all take equally unless the parent directs to the contrary. The power is reserved to the parent in order to meet the exigencies of the family. It may be assumed that in all these cases no litigation is contemplated.

(1) 2 Coll. 108, 116. (2) 1 De G. & Sm. 662.

Therefore what happened? The father began by appointing to his eldest son £5700, part of the £20,000, then he made appointments of £5000 to the second child, £5000 to the third, and £4300 to the fourth, making up the whole of the £20,000, but there remained unappointed the bonuses which should arise from the policies of assurance. Then by the settlement the property, so far as not appointed, is divisible equally among the children. That which is not appointed goes in default of appointment. Therefore the eldest son gets £5700 besides his share in the unappointed part. All are, however, bound to bring into hotch-pot. The consequence is that when the shares of the younger child are made up so as to be equal, or as nearly equal as the available funds will admit, to the share of the eldest son, the eldest will get no part of the unappointed fund. In effect, therefore, the younger children must take equally with the eldest before he can get any share of the unappointed fund. This was certainly not the division contemplated by the parents, and now a difficulty arises by reason of costs being incurred. These children being all equally entitled, what does justice require? My opinion is that each part of the fund should bear an adequate proportion of the costs. It would not be just to throw the whole costs on the eldest son, but I do not see the justice of the eldest son going scathless. It may be just where all the parties claim under a like residuary bequest, and they take by the mere bounty of the testator, but this is a case where all the children are purchasers for value and entitled to take free from costs as far as they can. Why should one take free and not the others? Why should they not bear the burden equally? That is how it seems to me on principle. Then, is there any authority against this? On the contrary, all the authorities take the same view. It does not seem to have been very much argued before Vice-Chancellor *Knight Bruce*. It seems that Mr. *Simpson*, for one of the incumbrancers, contended that as there was a fair question occasioned by the language of the deeds, the costs ought to come out of the unappointed part of the fund, by analogy to the case of a will where the costs arising from difficulties of construction fall upon the residuary estate, but the Vice-Chancellor said that, as he believed, the rule had not been applied to appointments, and he

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directed the costs to be apportioned according to the amounts of the appointed and unappointed parts of the fund, and to be borne by those parts respectively according to their amounts. That is, therefore, a clear decision on the subject, and it seems to have been followed ever since, and to have become an established rule. Therefore the costs must be apportioned between the appointed and unappointed shares rateably. The costs of this application must be costs in the action.

Solicitors: *Crawley & Arnold; Collyer-Bristow & Co.*

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WELMAN *v.* WELMAN.

[1879 W. 481.]

Rectifying Deed—Improper Settlement—Power of Revocation—Powers of Jointuring and raising Portions.

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A father being seised in fee of a large estate, and having a small estate for life with remainder to his son in tail male, the father and son executed a deed of conveyance to the father in fee of the small estate, and a deed of settlement of the large estate to the use of the father for life, with remainder to the son for life, with remainder to the eldest and other sons of the son successively in tail male. The deed contained no powers of jointuring widows or of raising portions for younger children. A joint power of revocation appeared in the draft as originally prepared by counsel, but had been struck out. The father and son had each a wife and a large family, and each declared that had he been aware of the effect of the deed he would not have executed it:—

Held, that under the circumstances the deed must be rectified by adding a power of revocation, and with the Plaintiff's consent it was directed that a new settlement, with all proper powers, should be made under the direction of the Court.

CHARLES NOEL WELMAN was, previously to the execution of the indentures of 1861 hereinafter mentioned, seised in fee of lands in the county of *Somerset*, called the *Wick Norton* and *Sevington* estates, of the clear value of about £4000 a year; and was tenant for life with remainder in tail to his son *Charles Cæsar Welman* of an estate of about 300 acres at *Weston Zoyland*, in the county of *Somerset*. *Charles Noel Welman* had recently built a mansion-house on the *Wick Norton* estate, and wished to

raise money to pay for it. His son *Charles Cæsar Welman* had attained the age of twenty-one years in March, 1861, and in July of that year, after an interview between *Charles Noel Welman* and his solicitor, Mr. *John Nicholetts*, it was arranged that the *Wick Norton* and *Sevington* estates should be settled by *Charles Noel Welman* in favour of himself and his eldest son and their issue, and that the *Weston Zoyland* estates should be disentailed and conveyed to *Charles Noel Welman* in fee. The only special direction given by *Charles Noel Welman* to Mr. *Nicholetts* was as to a son or grandson becoming a Roman Catholic priest. The details were left entirely to Mr. *Nicholetts*, and were settled and arranged by him without any further communication with *Charles Noel Welman*. Drafts of the two indentures were settled by counsel on instructions given by Mr. *Nicholetts*. The draft of the settlement was in existence, and contained the limitations of the estates hereinafter mentioned, without any power of appointment, or power of jointuring widows, or power of raising portions for younger children. The draft, however, as originally prepared by counsel, contained a power to *Charles Noel Welman* and *Charles Cæsar Welman* by deed to revoke the uses and to limit and declare other uses of the estates. On the margin of the draft were written in the writing of the counsel these words: "Will not a power of this nature be deemed desirable?" And at the foot was written by him, "I have resettled the draft in accordance with my further instructions." The draft contained alterations in red ink admitted to have been made by the son of Mr. *Nicholetts*, who was a solicitor and appeared to have been acting with his father; and the power of revocation was struck out in red ink. The deed appeared to have been engrossed and executed as so altered. *Charles Cæsar Welman* was then an ensign in the army, quartered at *Weymouth*, and had a very imperfect, if any, knowledge of his rights or interests. He was informed by his father that some family deeds would have to be executed, but he was not consulted by his father or Mr. *Nicholetts*, and knew nothing of the deeds or of the circumstances until on the 27th of September, 1861, he received from Mr. *Nicholetts* a letter requesting him to meet his father at *Yeovil* and execute the deeds. This letter gave an analysis of the contents of the deeds; and at the end was a request

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to be told whether he understood the effect of the deeds, and with such understanding was satisfied to sign them; but *Charles Cæsar Welman*, as he stated, from ignorance derived very little information from the letter. About the day of the date of the indentures *Charles Cæsar Welman* went from *Weymouth* to *Yeovil*, and there met his father and Mr. *Nicholetts* and his son. After a short conversation the engrossments of the indentures were produced, and were executed by *Charles Noel Welman* and *Charles Cæsar Welman*. They were then retained by Mr. *Nicholetts*.

The indenture of settlement was dated the 1st of October, 1861, and was made between *Charles Noel Welman* of the first part, *Charles Cæsar Welman* of the second part, and two trustees of the third part. After reciting that *Charles Noel Welman*, being desirous of making some provision for his eldest son and other sons and their children, had proposed and agreed to settle the estates thereinafter described accordingly, It was witnessed that for effectuating the purposes aforesaid, and in consideration of the natural love and affection which he had for his eldest and other sons and their children, and for divers other good considerations him thereunto moving, he the said *Charles Noel Welman* did grant and convey unto two trustees and their heirs the several hereditaments firstly, secondly, and thirdly therein mentioned, with their appurtenances (being the said *Wick Norton* and *Sevington* estates), to hold the same, subject to an annuity and a mortgage for £6000, to the uses following (that is to say), as to the hereditaments thereinbefore firstly and thirdly described or referred to, to such uses and upon such trusts as the said *Charles Noel Welman* should by deed appoint for the purpose of raising out of or charging upon the said premises or any part or parts thereof any sum or sums of money not exceeding in the whole the sum of £4000 and interest; and as to all the hereditaments firstly, secondly, and thirdly therein described, to the use of the said *Charles Noel Welman* and his assigns during his life without impeachment of waste, with remainder to the use of the said *Charles Cæsar Welman* and his assigns for his life without impeachment of waste, with remainder to the use of the first and other sons of the said *Charles Cæsar Welman* severally and successively according to their respective seniorities in tail male,

with remainder to the use of *Arthur Nelson Welman*, the second son of *Charles Noel Welman*, for life, and to his sons in tail, with similar remainders to the other sons, with remainders to daughters and ultimate remainder to the right heirs of *Charles Noel Welman;* and it was declared that if any son or grandson of *Charles Noel Welman* for the time being entitled in possession or remainder under any of the limitations should take orders or become a priest in the Roman Catholic Church, then the limitations in favour of such son or grandson should cease, and the estates should go over as if he being a tenant in tail were dead.

On the same day a disentailing deed was executed by the father and son by which the *Weston Zoyland* estates were conveyed to *Charles Noel Welman*, his heirs and assigns.

In 1879 this action was brought by *Charles Noel Welman* and *Charles Cæsar Welman* against *Edward Charles Welman*, the eldest son of *Charles Cæsar Welman*, and two other sons of *Charles Cæsar Welman*, and the surviving sons of *Charles Noel Welman*, and the trustees of the indenture of settlement. The statement of claim stated as above stated, and that no further explanation than that as above stated was given to the Plaintiffs as to the deeds; that the fact of the power of revocation having been struck out was not brought to their notice; that they were not aware that the effect of the indenture of settlement would be to place the ownership of the estates absolutely and irrevocably beyond their control, and prevent their making any provision for their wives or younger children; and if the effect of the indenture had been explained to the Plaintiffs, and the question of the advisability of the power of revocation had been discussed, they would not have executed the indenture; that the Plaintiffs had recently become desirous of making some provision for their wives and younger children, and it was only upon making inquiries for that purpose and examining the said indenture that it was discovered that the indenture contained no powers of jointuring or raising portions or revocation. And the Plaintiffs claimed to have the indenture of settlement rectified by having the power of revocation which was inserted by counsel in the draft as aforesaid inserted or added thereto.

At the time when the action was brought *Charles Noel Welman*

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had a wife and ten younger children; and *Charles Cæsar Welman* had a wife and eight children, of whom the Defendant *Edward Charles Welman* was the eldest son, and was about fourteen years old. The power of mortgaging the *Wick Norton* and *Sevington* estates had been exercised.

No instructions to counsel could be found. The counsel was dead, Mr. *Nicholetts* was dead, and his son had long ceased to be employed as a solicitor, and had very little remembrance of what took place at the time when the indenture was executed. The Plaintiffs made affidavits verifying the statements of the claim, and the affidavit of the son contained the passage read and relied upon by his Lordship.

The action now came on for trial.

Bristowe, Q.C., and *Morshead*, for the Plaintiffs:—

This is a voluntary settlement by the father and the son, and they could not have intended to make no provision for widows or younger children. The Court has always set aside such settlements: *Wollaston* v. *Tribe* (1); *Coutts* v. *Ackworth* (2); *Baker* v. *Loader* (3); *Smith* v. *Iliffe* (4); *Phillips* v. *Mullings* (5); *Hanley* v. *Pearson* (6). Reliance, no doubt, will be placed upon *Elwes* v. *Elwes* (7), but the circumstances there were very peculiar; and *Prideaux* v. *Lonsdale* (8) was a similar case. The grandson is merely a volunteer; besides, as head of the family the proposed rectification will in fact be for his benefit, and what he would do if of age. The Plaintiffs have no intention of alienating the estate, though they no doubt could do so under the statute of *Elizabeth*, but they prefer coming to the Court, and they are willing to have a resettlement.

Glasse, Q.C., and *S. Dickinson*, for *Edward Charles Welman*, the first tenant in tail:—

Our client has a vested interest in this estate, and there is no case in which a deed has been rectified on the ground of the

(1) Law Rep. 9 Eq. 44.
(2) Ibid. 8 Eq. 558.
(3) Ibid. 16 Eq. 49.
(4) Ibid. 20 Eq. 666.
(5) Law Rep. 7 Ch. 244.
(6) 13 Ch. D. 545.
(7) 2 Giff. 545; 3 D. F. & J. 667.
(8) 1 D. J. & S. 433.

alleged intentions of the parties, to the exclusion of any one who has acquired a vested interest under it. The son gave up his estate tail in the *Weston Zoyland* estate in consideration of the settlement made on his son. There is very little evidence in this case, and it is not clear that when all the charges are paid the estate will bear jointures and portions. The settlement was made nearly twenty years ago, and has been acted upon. The Court of Appeal in *Hall* v. *Hall* (1) dissented from the doctrine that the want of a power of revocation was a reason for setting aside a deed. The error at the time must be shewn: *Earl of Bradford* v. *Earl of Romney* (2). We at the present time may think this deed imprudent, but that is not a ground for setting it aside: *Fowler* v. *Fowler* (3). It is said that the son did not understand the effect of the deed, but if that was enough half the settlements made might be set aside. How could a young officer be made to understand powers of revocation, jointure, &c., or judge of their expediency. The Plaintiffs do not ask to have the deed set aside, but ask to have inserted a power which was struck out. There is no evidence that the parties ever intended to reserve a power of revocation. This was a clear bargain between the father and the son: *Teasdale* v. *Braithwaite* (4); *In re Foster and Lister* (5). The letter of the solicitor to the son is very explicit, though it might have been better if he had drawn the attention of the son to the powers which might be inserted, but that is not enough ground on which to set aside a deed.

W. W. Karslake, *Langworthy*, and *Fooks*, for the other Defendants.

MALINS, V.C., after stating the facts of the case, continued:—

The result of this, therefore, is that the father, who is sixty-five years of age, is at this moment tenant for life, and if he dies the estate must necessarily go, as the settlement now stands, to his son for his life, and if he dies the whole estate must go to his eldest son, who is but a boy of fourteen years of age; so that the grandfather

(1) Law Rep. 8 Ch. 430.
(2) 30 Beav. 431.
(3) 4 De G. & J. 250, 264.
(4) 4 Ch. D. 85.
(5) 6 Ch. D. 87.

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has not the power of giving his wife means of subsistence after his death, and has not power of giving a single farthing, as I understand there is no property but these estates in the family, for the younger children, and when he dies the son will be in an exactly similar situation. If he dies his mother will be destitute, and his brothers and sisters will be destitute; his widow will be destitute, and all his younger children will be destitute.

Now, will anybody say that this is a settlement that any human being ought to have been advised to make, or ought to have made? No man living ever saw such a settlement before, and I believe no man dead ever saw such a settlement. I want no authorities, I want no precedents to satisfy me that such a thing as that cannot stand, because it is opposed to every principle of propriety, as well as to the honour and interest of the family; and I think, notwithstanding the zeal displayed by the counsel for this boy, that anything more prejudicial and detrimental to his interest can scarcely be conceived than that he should stand alone in possession of the whole of this family property, leaving every other member of it destitute.

Now I have in evidence the drafts drawn by a conveyancer of experience and ability, and I must confess that I am surprised that, even with the power of revocation, any solicitor should have given instructions for such limitations as these; and I am also surprised that any conveyancer could have drawn a draft in such a form, because the power of revocation might not have been exercised, and if it had not been exercised all these calamities which I point out would have fallen on the family in consequence of the improper form of this settlement. But it was drawn with a general power of revocation and new appointment jointly by the father and son, so that they could have corrected the errors and improprieties. They now say that they have recently discovered that by some accident which they cannot account for—there is not a tittle of evidence to shew how it happened—this power of revocation was struck out.

There being no evidence, what is the presumption? Surely I am bound to presume that there was something like the ordinary course of business adopted on this occasion, and is it not the ordinary course, when father and son join in barring the entail of

a family estate and re-settling it, to put the property, or a considerable part, subject to the joint appointment of the father and son, and then to make the limitations which they desire to have subject to that power of appointment? It is a mere matter of taste in conveyancing whether the limitations are preceded by the joint power of appointment, or the limitations are declared and a power of revocation is added. I should have put the general power of appointment first, but here the conveyancer effected the same object by inserting this joint power of revocation. The draft contains this power, and ought I to presume against every principle of common sense, and everything which appears to me to be in accordance with the interests of this family, that it was intentionally struck out with the consent of the father and the son?

The father had ten younger children at the time, and the son was a young man likely to marry; and is it possible to believe that if the father had understood what he was about, he would have reduced himself to this state, so that he cannot give a penny to any member of his family, but must allow the estate to go to his eldest son and the eldest son's eldest son? I am bound to say that the whole thing was done in a manner which is not to be approved of, that neither the father nor the son were informed of what they were about, and did not understand it. I am perfectly clear that the son was misled, and had no opportunity of understanding it, and executed it in perfect ignorance. The deed is one which ought not to have been executed, and I come to the conclusion that it was executed by the father and son in the belief that they retained the control over the estates, and that control they could only retain by having this power of revocation or joint power of appointment.

But what are the objections? Mr. *Glasse's* argument is that there is no case in the books in which under a settlement (he says this was not a voluntary settlement) a person has acquired an estate and the deed has been altered so as to destroy that estate. All I can say is that that was so in almost all the cases cited before me. It was so in *Coutts* v. *Ackworth* (1) and in *Baker* v. *Loader* (2), a case decided by myself. Another such case was

(1) Law Rep. 8 Eq. 558. (2) Law Rep. 16 Eq. 49.

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Wollaston v. *Tribe* (1); so it was in *Harbidge* v. *Wogan* (2); so it was in *Smith* v. *Iliffe* (3); so it was in *Phillips* v. *Mullings* (4); so it was in *Hanley* v. *Pearson* (5). As to *Elwes* v. *Elwes* (6), that was a case not seeking to set aside anything in a deed, but to insert a provision for raising £100,000 for the benefit of daughters; and the Court came distinctly to the conclusion that there never was any intention that such a clause should be inserted. *Prideaux* v. *Lonsdale* (7) was of the same character.

Every case to be found in the books goes to this, that although a vested interest may be acquired, yet if a deed was executed in a form in which it ought not to have been, and which the Court is satisfied is not in conformity with the intention of the parties, then, regardless of all interests acquired, the Court will put the deed into a form which is in accordance with the intention of the parties. Therefore I am not acting contrary to any case, and if this is a new case, I, as far as I have power, will make a precedent when I see a settlement like this executed in such a form, and where the father and son have pledged their oaths that they did not know of the form in which it was done, and in fact that they would not have executed it if they had known it. The son says this: "It was never pointed out or suggested to me before I executed the said indenture of settlement and conveyance that the effect of the said indenture of settlement as executed by my father and myself would be to place the ownership of the estates comprised therein absolutely and irrevocably beyond our joint control, and prevent us from making any provision thereout whatsoever for our wives or any of our younger children, and if the effect of the said indenture had been explained to me before we executed the same, or if the question of the advisability of the insertion of a joint power of revocation had been discussed, or the fact that our counsel had suggested such a power had been mentioned, I would not have executed the same settlement or consented to the provisions thereof."

It is the rule of this Court that where a marriage settlement or

(1) Law Rep. 9 Eq. 44.
(2) 5 Hare, 258.
(3) Law Rep. 20 Eq. 666.
(4) Law Rep. 7 Ch. 244.
(5) 13 Ch. D. 545.
(6) 2 Giff. 545; 3 De G. & J. 607.
(7) 1 D. J. & S. 433.

any other contract is in an improper form, and not in accordance with the intention of the parties, then the intention of the parties shall be carried out by putting the instrument into that form which will effectuate the intention. I did so lately in an unreported case of *Von Witzleben* v. *Siltzer* (July 2, 1880). There a lady married at the age of eighteen having £18,000, which was settled on herself for life, with remainder to her husband for life, with remainder to her children, and remainder to her next of kin, without any power of appointment to her in default of children. She had been married many years and had no children, and though it was heard as a short cause, the point was treated as arguable; but I decided without the slightest doubt or hesitation that there should be added a general power of appointment by will in the event of her dying without children. I did not listen for a moment to the argument that her next of kin, whoever they might be, had acquired any interest against her, and I was clear that it was right that she should have the control of her own property in the manner I have stated.

There is only one other point which I have to observe upon. It has been argued that this is a settlement for valuable consideration. I have already said that as between the father and the son there is a consideration moving from the son to the father, namely, the giving up of the smaller estate. As between the father and the son, as in *Teasdale* v. *Braithwaite* (1) and in *In re Foster and Lister* (2), there was a contract which prevented the settlement from being held voluntary. Still the two together had dominion over the property, and whatever interest the son had acquired by this arrangement he was at liberty to alienate, and nothing has occurred to prevent this from being an ordinary voluntary settlement. I certainly am under the impression that if the father and son in this case thought fit to join together in selling the estate, they would be perfectly at liberty to do so under the statute of *Elizabeth*, and their alienation would be conclusive against the issue of the son.

Therefore, under all these circumstances, the deed must be corrected as asked, and there must be a general power of revocation inserted; but I should be very sorry to suppose that the father and

(1) 4 Ch. D. 85. (2) 6 Ch. D. 87.

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son would take advantage of this to dispose of the estate altogether away from the family. Mr. *Bristowe*, on behalf of the father and the son, offers that a proper settlement should be made—in other words, that, instead of simply correcting the settlement by inserting a power of revocation, there should be a new settlement executed under the direction of the Court, in which the father would be made tenant for life with such powers annexed to his life estate as are usual considering the circumstances and value of the property and as the Court, if it had made the settlement in 1861, would have inserted, and the son would be made tenant for life in remainder with such powers annexed to his estate as the Court would have given him under the circumstances, with remainders over to the grandsons and sons successively in tail.

Solicitors for Plaintiffs: *Tylee, Wickham, & Moberly.*
Solicitors for first tenant in tail: *Norris & Gordon.*

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PAUL *v.* PAUL.

[1878 P. 105.]

Marriage Settlement—Ultimate Limitation to Next of Kin—Volunteers—Creditors.

By a marriage settlement of the wife's property, consisting of money in the funds, a general power of appointment by will was given to the wife, in the event of her dying before her husband without children, and in default of appointment there was a trust for the next of kin of the wife excluding the husband. But if the wife survived, then, in default of children, in trust for the wife absolutely. The father of the wife joined in the settlement, and covenanted to pay an annuity to his daughter. During the life of the husband and wife debts were contracted by the wife. There were no children, and the impossibility of there being any was not questioned:—

Held, upon the application of the wife, and with the approbation of the husband, that the next of kin being mere volunteers, and not within the marriage consideration, the corpus of the trust funds might be applied in payment of debts.

BY a settlement dated the 2nd of December, 1845, made upon the marriage of *John Paul* with *Barbara Louisa Coventry*, certain

sums of money to which the intended wife was entitled for her own benefit under the marriage settlement of her father and mother, were covenanted to be paid to the trustees of the settlement, upon trust to pay the annual dividend to *John Paul* for his life and after his decease to his intended wife, and upon the death of the survivor, the trustees were to stand possessed of the trust funds for the benefit of the children as therein provided, and in case there should be no children of the marriage, then if Mrs. *Paul* should die in the lifetime of her husband, upon trust, after the death of *John Paul* and such failure of children, for such persons as Mrs. *Paul* should by will direct or appoint, and in default of such direction or appointment in trust for such persons as at the decease of Mrs. *Paul* would have become entitled thereto under the *Statute of Distributions*, in case she had died intestate and unmarried; and if the said *John Paul* should die in the lifetime of Mrs. *Paul*, then from and after the death of *John Paul* and such failure of children, in trust for Mrs. *Paul*, her executors, administrators, and assigns; and by the said settlement *Frederick Coventry*, the father of Mrs. *Paul*, covenanted with the trustees that he would during his life pay to them an annual sum of £200 upon trust for *John Paul* for life, and after his decease for Mrs. *Paul*, and after the decease of the survivor, if the said annuity should so long continue payable, for the maintenance and education of the children of the marriage.

In pursuance of this covenant several sums were paid to the trustees of the settlement amounting to about £11,570. There had never been any children of the marriage and the impossibility of there being any such children was now admitted.

In March, 1864, a separation deed was executed, by which *John Paul* assigned to the trustees thereof the dividends upon all the settled funds, upon trust to pay one moiety thereof to *John Paul* during his life and the other moiety to Mrs. *Paul* for her separate use during her life. In February, 1865, the trustees of the marriage settlement advanced to *John Paul* the sum of £600 out of the trust funds upon the security of his life interest in such funds and a policy of assurance effected upon his life.

By a decree on the 15th of March, 1873, in a suit of *Coventry* v. *Paul*, the income of Mrs. *Paul* in the trust funds was de-

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cleared to be charged with the payment to the plaintiffs in that suit of the principal sum of £1775, with interest and the costs of the suit. The plaintiffs in that suit had ever since continued in receipt of Mrs. *Paul's* income, and their claim was now almost cleared off.

By another decree, dated the 15th of December, 1873, made in a suit of *Jackson* v. *Paul*, the income of Mrs. *Paul* from the trust funds was declared to be charged with the payment of the principal sum of £82 14*s.* 7*d.*, with interest and the costs of the suit, but the Plaintiff *Jackson* had not received anything under his decree.

This action was instituted by Mrs. *Paul* against Mr. *Paul* her husband, and the trustees of the marriage settlement, and the surviving trustees of the separation deed, to administer the trusts of the settlement and of the separation deed.

By an order dated the 5th of July, 1878, made in this action on Mrs. *Paul's* petition, it was ordered that on Mrs. *Paul* assuring her life for £1300 against the life of Mr. *Paul*, the trustees by a sale of part of the moiety of the trust funds, to the income whereof Mrs. *Paul* was entitled, should raise the amount of the costs of the action, and a sum of £1300, and that out of the £1300 they should pay the debts of Mrs. *Paul*, not exceeding £1100, and pay the residue to Mrs. *Paul*. And it was ordered that the residue of the income of the moiety should during the lives of Mr. and Mrs. *Paul* be charged with the payment of the premiums necessary to keep up the policy. The trustees raised the £1300 and costs, and paid the costs and £200 to Mrs. *Paul*, and also a portion of the debts; but subsequently discovered that the debt charged upon the funds by the decree in *Jackson* v. *Paul* had not been provided for. They therefore declined to apply the residue of the £1100 without the further sanction of the Court. Thereupon, on Mrs. *Paul's* application, an order was made on the 28th of November, 1878, directing the payment of the debts therein specified, and also directing an inquiry whether it would be for Mrs. *Paul's* benefit that any sum should be raised out of the trust funds for payment of any further debts. The trustees subsequently obtained leave to bring the trust funds into Court, which had been done, and the money so paid in was standing to two separate accounts,

one moiety to Mr. *Paul's* life interest account and the other moiety to Mrs. *Paul's* life interest account.

On the 3rd of July, 1880, the Chief Clerk certified as the result of the inquiries made by him that it would be for the benefit of the Plaintiff that the debts enumerated in the schedule, which amounted to £1145 15s., should be raised and paid out of the income and corpus of the moiety of the trust funds to which the Plaintiff, Mrs. *Paul*, was entitled for life, and the Defendant, *J. Paul*, was willing, on receiving £300 cash out of the like funds, to waive any further policy of insurance, and to consent to the existing policy for £1300 being surrendered, and to give up all his interest, if any, in the policy for £600, he being exonerated from any future liability for the premiums thereon.

The trustees objected to such an arrangement being carried out, on the ground that the Plaintiff had only a testamentary power of appointment in case she predeceased her husband; and in default of appointment by her the trust funds would go to her next of kin at her death as if she were unmarried, and such next of kin could not now be ascertained.

A motion was now made on behalf of the Plaintiff, Mrs. *Paul*, that the Defendants the trustees of the indenture of settlement might be ordered to surrender the policy for £1300 effected in the *Royal Exchange Assurance Corporation* on the life of the Plaintiff, for the surrender value thereof, and out of the sums so to be received and of the cash now in Court to the credit of this action, and the cash to the credit of the trust funds subject to the life interest of the Plaintiff *Barbara Louisa Paul*, the debts referred to in the Chief Clerk's certificate dated the 3rd of July, 1880, and a sum of £300 to be paid to the Defendant *John Paul*, he waiving all claim to have any further policy of insurance on the life of the Plaintiff effected by her and consenting to the surrender of the said existing policy for £1300, and to assign or surrender all his interest, if any, in the policy for £600 now subject to the trusts of the said indenture of settlement, and the said costs when so taxed as aforesaid, might be paid, and that to the extent of the said debts and the sum of £300 and costs as aforesaid, the balance might be raised and paid out of the corpus of the said trust funds standing to the like credit and account, and that such further or

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other order might be made as to the Court, under the circumstances, should seem just.

Glasse, Q.C., and *Romer*, for the Plaintiff:—

We submit that this settlement ought to be set aside to the extent of applying so much of the property as may be necessary for the payment of the wife's debts. This was a settlement of the wife's property; the intention of the settlement was to provide for the children of the marriage after the death of the husband and wife. That was the only limitation within the marriage consideration. There were no children, and in that case the wife was given a power of appointment by will in case of her dying before her husband, but she has no power to dispose of a penny of her property during her life. She is bound by this settlement to preserve the property for her next of kin: for people who may be utterly unknown to her, and, in fact, may not now be in existence, and for whom she cannot possibly have any regard or affection; and her creditors are to go unpaid, and she is to remain insolvent while her own property is locked up for the sake of entire strangers. The next of kin are mere volunteers. There is no consideration to support the limitation in their favour. All the authorities are in favour of our argument that collaterals are to be treated as mere volunteers in a settlement where the collaterals are a class. It was distinctly laid down in *Smith* v. *Cherrill* (1) that a settlement containing a provision for the collateral relatives of the wife was strictly voluntary, and, being without consideration, absolutely void as against creditors, notwithstanding that one object of the settlement was to provide for a niece and adopted child of the wife who was named in the deed. This case followed the law as laid down in *Johnson* v. *Legard* (2), and *Cotterell* v. *Homer* (3). There are cases in which a settlement has been upheld in favour of children by a former marriage, as in *Newstead* v. *Searles* (4); or where there was a provision for illegitimate children, as in *Dickenson* v. *Wright* (5); but a settlement in favour of collateral relatives has never been upheld: *Wollaston*

(1) Law Rep. 4 Eq. 390.
(2) 6 M. & S. 60.
(3) 13 Sim. 506.
(4) 1 Atk. 265.
(5) 5 H. & N. 401.

v. *Tribe* (1), *Everitt* v. *Everitt* (2); and *Smith* v. *Iliffe* (3), *Hanley* v. *Pearson* (4), and *Heatley* v. *Thomas* (5) are all cases in our favour.

Higgins, Q.C., and *Whitehorne*, for the husband, acceded to the application.

J. Pearson, Q.C., and *W. Barber*, for the trustees of the settlement:—

This is not an action to rectify a settlement. It has not been alleged that it was drawn contrary to the intention of the parties; nor is this an application by the creditors. It is an action brought for the execution of the trusts of the deed, and the only question is whether the Court can set aside the settlement and disregard the ultimate trusts for the next of kin of the wife. As counsel for the trustees it is our duty to warn the Court as to what the real effect of this application is. First, then, what is the settlement? It is said these collateral relatives are not within the marriage consideration, and that the husband and wife and the children are the only persons affected by the marriage consideration, but we know that limitations in favour of collaterals have been supported because they came within what was the contract on the marriage taking place. What, then, was this contract? The deed itself is the only evidence of that contract. The settlement alone is the contract. There are two distinct reasons which would prevent the Court from treating the next of kin as being outside the contract. This is a settlement of the wife's property alone. It comprises no portion of the husband's property, and, according to the rules of interpretation, when you find an ultimate limitation of the settlor's property, that is part of the proof of the agreement come to between the parties. The fact that this settlement was a complete disposition of the whole interest, and that it was the woman's own property, is *primâ facie* evidence that it was the consideration for which the settlement was executed. There is an evidence of this in the fact that the father of the wife was a

(1) Law Rep. 9 Eq. 44.
(2) Ibid. 10 Eq. 405.
(3) Law Rep. 20 Eq. 666.
(4) 13 Ch. D. 545.
(5) 15 Ves. 596.

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party to this deed, and in pursuance of the agreement entered into between all the parties upon the occasion of the marriage the father was to pay to his daughter an annuity of £200. It is the father who covenants to pay that sum. Surely it is not inconceivable that the father, who was a party to settling this property, may have said, I make an appointment to my daughter of this property upon condition that if she should die without any appointment by will, the property shall come back to the family; what could there be more reasonable than that? The Court is now asked to deal with the whole fund as if there was no limitation whatever in favour of the next of kin of the wife. Such a decision would go far beyond anything which has hitherto been done, and the Court has no power to accede to this application. In *Heap* v. *Tonge* (1) Vice-Chancellor *Wigram* referred to cases which had been cited where the wife could not be considered to stipulate on the part of the relations of the husband because there was no one who purchased anything for the benefit of those relations, but if there were any person purchasing on behalf of the collaterals the limitations would be supported.

The mere fact that the father was a party to the deed and entered into a covenant which he performed, prevents the Court in such an action as this, which proceeds on the settlement being valid, from disregarding the limitation for collaterals. The question is, what was the contract? and you have only to look at the deed and you find what the agreement was, and that it must be carried out in favour of collaterals. Would not the Court be doing a very strong thing to disregard this limitation for collaterals? Mr. *Dart* in his book says (2): "As against the settlor and his heirs, limitations in favour of collaterals contained in an ante-nuptial settlement are binding," and he cites *Davenport* v. *Bishopp* (3); and the question is also discussed in *Davidson's* Precedents (4).

First, then, we contend that this is a question of construction, in dealing with which the Court cannot look outside the deed. It is not like a case where the collaterals are seeking to enforce an incomplete settlement. Here the covenant contained in the settlement has been performed, and the money has come to the

(1) 9 Hare, 102.
(2) 5th Ed. p. 893.
(3) 1 Ph. 698.
(4) Vol. iii. p. 670.

hands of the trustees and is subject to the trusts whether voluntary or not. The question is not whether collaterals are within the marriage consideration, but it is a question of construction of the deed. Then we have the further fact that the father of the lady comes in and pays an annuity of £200 a year. The case, therefore, cannot be treated as one of mere volunteers.

[They also cited *Ellison* v. *Ellison* (1), *Kekewich* v. *Manning* (2), and *Davenport* v. *Bishopp* (3).]

Gover, for creditors.

MALINS, V.C.:—

I think the point in this case is reasonably free from any doubt. The question I have to deal with arises in this way. Upon the marriage of Mr. and Mrs. *Paul* in December, 1845, the property, which was property belonging to the lady only, was settled in the usual manner for the husband for life, then for the wife for life, and then for the children of the marriage, but if no children, then if Mrs. *Paul* should survive her husband the capital was given to her absolutely, but if she predeceased her husband, then she had a general testamentary power of appointment, and in default of appointment the capital was to go to Mrs. *Paul's* next of kin.

It turns out that there have been no children of the marriage, and, considering that the marriage took place thirty-five years ago, there is no longer any possibility of there being children; therefore the only persons interested in the settlement are the husband and wife. It happens that they live apart, and Mrs. *Paul* has incurred debts, and there is no way of discharging those debts except by means of this settlement fund. The question therefore is, whether she is to have her debts paid out of the fund. A reference has been made to Chambers to inquire whether it is for the benefit of Mrs. *Paul* that the debts should be paid, and the Chief Clerk has reported that it will be for her benefit that the debts which she has incurred, and which amount to the sum of £1145 15*s.*, should be paid out of the accumulated income and

(1) 6 Ves. 656, 661. (2) 1 D. M. & G. 176.
(3) 2 Y. & C. Ch. 451; S. C. 1 Ph. 698, 803.

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corpus of the moiety of the trust fund to which Mrs. *Paul* is entitled. The fund is here, and the only objection is this—that the ultimate limitation in the marriage settlement is for the benefit of the next of kin of Mrs. *Paul* in case she should predecease her husband, because if she should survive him the corpus is to go to her absolutely. The next of kin is a class who may not now be in existence, and who cannot at present be ascertained, since they must be the next of kin living at the death of Mrs. *Paul*. In this state of circumstances I have had a laboured argument on the part of Mr. *Pearson* and Mr. *William Barber* to shew that I cannot allow these debts to be paid—indeed Mr. *Barber* has fairly warned me that I shall be guilty of all sorts of injustice if I do what is asked by this motion.

Now look at the common sense of this question. Upon what grounds are these limitations for the next of kin to be supported? Why should not Mrs. *Paul* have the property absolutely if she should die in the lifetime of her husband as well as if she should survive him? She is, however, to have a general power of appointment by will, but in case of no appointment, then it is to go to the next of kin, excluding the husband. Therefore the only object of the limitation is to prevent the husband from being entitled to any portion of the fund. That is the sole purpose of the limitation. It is shewn that Mrs. *Paul* has had no children, and cannot now have any, therefore she is the only person in the world who is interested in the property, and yet she is entitled to no share in it; but the argument is that she must walk about the world insolvent all her days because a class of persons she knows not, and who may not even be in existence, are entitled to this property in case she should predecease her husband without disposing of it by her will. Moreover, her creditors can only have her life interest in the property, and though she is deeply indebted, her next of kin come in upon her death and sweep away everything. If that is the state of the law I can only say that it is very much to be regretted, for anything more absurd or ridiculous than that this class of unknown persons should come in at the death and stop any further payment to her creditors, is repugnant to every principle of equity and common justice. But there is no proposition so absurd that it cannot be supported by some supposed authority, so I am referred

to the case of *Ellison* v. *Ellison* (1), a decision of Lord *Eldon's* which draws the distinction between cases where there is only a voluntary covenant to do a thing and cases where the act is perfected; and it is laid down that the assistance of the Court cannot be had without consideration to constitute a party *cestui que trust*, as upon a voluntary covenant to transfer stock; but if the legal conveyance is actually made constituting the relation of trustee and *cestui que trust*, or if the stock is actually transferred, though without consideration, the equitable interest will be enforced. All that Lord *Eldon* lays down there is, that a voluntary settlement, when actually carried into effect, is as binding as if there were consideration.

Now, in order to establish this point I was referred to *Davenport* v. *Bishopp* (2), to shew that a collateral limitation in a settlement must be supported. That was a contract between the husband and wife to settle any after-acquired property which the wife might become entitled to; but it being the wife's property, the contract was that, if there were no children of the marriage, then it was to go to the wife's niece. The suit was instituted by the husband, after the death of his wife, to have the trusts carried out, by the conveyance of an estate which the wife had become entitled to during her life, to the uses of the settlement. Then, on the question whether the decree for specific performance should be confined to the life estate of the husband, or should extend to the limitation to the niece, it was held that it should extend to the niece, on the ground that the right of the husband to a specific performance of part of the covenant drew with it the right to a specific performance of the whole, at least as against the heir of the settlor, whatever it might have done against a purchaser for value.

Another case relied upon was that of *Kekewich* v. *Manning* (3), but that was a settlement in favour of a collateral relative by name, a person clearly defined; not unascertained, but ascertained, and therefore it was that that person was declared entitled, because there was a complete alienation, so as to be capable of enforcement at the instance of the trustees of the settlement.

(1) 6 Ves. 656. (2) 2 Y. & C. Ch. 451.
(3) 1 D. M. & G. 176.

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Then we turn to the negative of all this, and we find the case of *Wollaston* v. *Tribe* (1), where Lord *Romilly* decided that the trusts in a marriage settlement in favour of the children of a future marriage and of collaterals were purely voluntary. There it was the wife's property that was settled, in case there were no children by that marriage or any future marriage of the wife, upon her nephews and nieces. The husband died, and there was no issue of the marriage, and the lady had not married again. So, Lord *Romilly* says, "The only part of the settlement which is now subsisting is purely voluntary, and not within the consideration of marriage." It was probable in that case that the wife, when she married, wished the property to go to her nephews and nieces, but she did not know that she would have no power of revoking the limitation.

It was only on the 21st of this month that I had a case before me of *Welman* v. *Welman* (2), where a father and son executed deeds cutting off the entail of a considerable estate, and re-settling it on the father for life, with remainder to the son for life, with remainder to the first and other sons in tail male. No provisions for giving jointures to widows, or raising portions for younger children, were inserted, and there was no power of revocation. The father and son and the younger children brought an action to have the settlement rectified by inserting a joint power of revocation. I there said that I scouted the idea of not having power to rectify such a settlement, and directed a new settlement to be made under the direction of the Court.

But there is another case stated by Mr. *Romer*, *Heatley* v. *Thomas* (3). That was a similar case to this. The wife had a power of appointment by will if she died during the life of her husband, and, in default of appointment, to her next of kin. Sir *W. Grant* decided that there was no consideration whatever to support the gift to the next of kin, and a bond was enforced against the wife's separate estate.

Under these circumstances I have no hesitation in deciding that this lady is to be at liberty to have the property applied in payment of her debts, instead of being left in poverty for the sake of

(1) Law Rep. 9 Eq. 44. (2) *Ante*, p. 570.
(3) 15 Ves. 596.

her next of kin, whoever they may hereafter happen to be. I think the objection is wholly unsustainable, and the order now asked for ought to be made. What I decide is, that the corpus of the property may be applied in payment of the debts.

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Solicitors: *G. S. Hare; Meynell & Pemberton: Munns & Longden; H. Gover.*

In re BOYSE.

CROFTON *v.* CROFTON.

[1880 B. 128.]

V.-C. M. 1880 *Aug.* 2.

Administration Action—Foreign Creditor—Foreign Court—Injunction.

Although judgment has been given for the administration of an estate, the Court has no power to restrain a foreign creditor from proceeding in a foreign Court against the administrator; but if judgment were obtained in the foreign Court against the administrator by default, it would only be treated in the administration action as *primâ facie* evidence of the debt.

A DECREE had been made in this action for the administration of the estate of *Jane S. Boyse.* She had for many years resided at *Marseilles,* where she died. Several tradesmen at *Marseilles* had carried in claims against her estate for goods supplied to her. The Defendant, who was the administrator, gave some of the claimants notice to attend and be cross-examined on their affidavits. The tradesmen thereupon desired to withdraw their claims in the action, and expressed their intention to proceed in *France* against the Defendant as administrator. The Defendant moved that the tradesmen might be restrained from prosecuting any action or other proceeding in the French Court or otherwise for the purpose of enforcing the claims made by them against the estate of *Jane S. Boyse.*

Glasse, Q.C. (*Hadley* with him), in support of the motion:—

These claimants having come in under the decree cannot now withdraw and institute proceedings in *France: Graham* v. *Maxwell* (1). We may not be able to enforce the injunction, but it

(1) 1 Mac. & G. 71.

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will prevent them from coming here on any foreign judgment obtained in default.

Vaughan Hawkins, for the claimants:—

The Court has never granted an injunction against a foreign resident abroad, and has no jurisdiction to do so: *Carron Iron Company* v. *Maclaren* (1). In *Graham* v. *Maxwell* (2) the creditor was proceeding before both Courts at once. These persons sent in their claims expecting to be paid, but when they find that they are opposed and are expected to leave their business and come over here, they withdraw their claim and wish to proceed in the place where the debt was incurred. If the administrator does not appear and defend at *Marseilles* it will be his own fault, and he ought to do so. The injunction will be a mere nullity, and why does the Plaintiff ask for it?

MALINS, V.C., after stating the facts of the case, continued:—

These persons either are creditors of Mrs. *Boyse* or are not. If they are, a decree for administration of her estate has been made in this Court and they must proceed here; and unless the Court is satisfied that their claims are valid they cannot succeed. Accordingly they have made their claims, but they now wish to withdraw them and to proceed before the Court at *Marseilles*, where, if the administrator is well advised, he will not appear, and they will probably obtain judgment by default. But that judgment will be of no use to them in this Court, and can only be treated as *primâ facie* evidence of the debt, because all proceedings by creditors except in this Court would be useless. Then comes the question whether I can restrain a foreigner from proceeding in a foreign Court. Certainly I should feel great difficulty in granting such an injunction. I find that in *Carron Iron Company* v. *Maclaren* (3) Lord *Cranworth* says: "Assuming this to be so, the first question is, whether there is any rule or principle of the Court of Chancery which, after a decree for administering a testator's assets, would induce it to interfere with a foreign creditor resident abroad suing for his debt in the Courts of his own country?

(1) 5 H. L. C. 416. (2) 1 Mac. & G. 71.
(3) 5 H. L. C. 441.

Certainly not. Over such a creditor the Courts here can exercise no jurisdiction whatever."

Therefore I feel that I cannot grant the injunction, but I can express my opinion that any proceedings in a French Court will be quite useless. Mr. *Hawkins* says that the administrator ought to appear and defend in *France*, but I think not, his only place is in this Court; and, however inconvenient it may be, the creditors must come here and establish their claims.

I must, therefore, refuse the injunction, but considering that they made a claim here and now wish to withdraw it, the motion will be refused without costs.

Solicitors for Plaintiff: *Gregory, Rowcliffes, & Rawle.*
Solicitors for Creditors: *Gellatly, Son, & Warton.*

Not followed. In re YOUNG, DECD. [1951] 1 Ch. 344

V.-C. H.

1880

April 7; *May* 3.

In re FLEETWOOD.
SIDGREAVES *v.* BREWER.

[1878 F. 59.]

Will of Personal Estate—Bequest to B. by Codicil of "all my personalty, such as cash, furniture, &c., to be applied as I have requested him"—Implied Revocation—Trust implied for Next of Kin—Parol Evidence—Attestation by one of Next of Kin.

A testatrix who had by will and three codicils made a complete disposition of her real and personal estate, afterwards executed a fourth codicil in the following words: "I hereby bequeath to *B.* (to whom I have willed my landed property) also all my personalty, such as cash, furniture, &c., to be applied as I have requested him to do." *B.* gave evidence that before executing this codicil the testatrix had stated to him the alterations she desired to make in her will, and that he had made a pencil memorandum of her various fresh bequests, repeating each item to her, and that, except so far as to give effect to the new wishes so stated to him, the testatrix did not intend to alter her previous dispositions.

The memorandum was not signed by the testatrix.

H., one of two joint beneficiaries of furniture mentioned in the memorandum, attested the execution of the fourth codicil:—

Held, first, that the words "such as cash, furniture, &c.," did not cut down the words "all my personalty," and that the fourth codicil comprised and gave to *B.* as trustee the entire personal estate.

Secondly, that the nature of the trust was sufficiently established by the evidence of *B.*, and being so established the Court would give effect to it.

Thirdly, that *B.* held the personal estate in trust to carry out the dispositions of the will and first, second, and third codicils, with the alterations effected by the new dispositions specified in his evidence.

Fourthly, that if the Court could not have given effect to the intended trusts, then, as the fourth codicil contained no express revocation of the will and three first codicils, but was executed in order to create new interests which had failed, the original dispositions in the prior instruments would have remained in operation.

Fifthly, that as *H.* had attested the fourth codicil her beneficial interest under the parol trust failed, just as it would have done had the trust been declared in the codicil, and that the whole beneficial interest in the furniture belonged to the other joint beneficiary.

ADMINISTRATION ACTION.

Elizabeth Fleetwood, by her will, dated in 1866, amongst other things, bequeathed a legacy of £400 and her gold watch to the Defendant *Magaret Sidgreaves*, and a legacy of £500 to *Peter*

Fleetwood, of *Kirby*; and as to the residue of her personal estate, after payment thereout of her funeral and testamentary expenses and debts, the testatrix bequeathed one moiety thereof to her cousin *Margaret Heyes*, if she should survive her, but if she should die before her, then to such of her children as should survive the testatrix in equal shares, and the testatrix bequeathed the other moiety to Mrs. *Glover* if she should survive the testatrix, but if she should die before her, then to the Defendant *Thomas Clitheroe*; and the testatrix appointed *John Ashton*, *Thomas Sidgreaves*, and *J. Tatlock* executors of her will.

By a codicil to her will, dated in 1872, the testatrix bequeathed her silver plate to the Defendant *Eliza Brewer*, and appointed the Plaintiff *John Sidgreaves* an executor of her will in the place of *Thomas Sidgreaves*.

By a second codicil, dated in 1874, the testatrix bequeathed the sum of £800 to her trustees in trust (in the event, which happened, of the death of Mrs. *Glover* in the lifetime of testatrix) for the Defendant *Thomas Clitheroe* absolutely, and she thereby revoked the bequest of a moiety of her residuary personal estate to Mrs. *Glover*, and bequeathed the same moiety to the Defendant *Eliza Brewer*.

By a third codicil, dated in 1875, the testatrix appointed the Plaintiff *E. W. Woods* an executor of her will and codicils in the place of *John Ashton*, who was then dead.

The testatrix made a fourth codicil to her will, dated the 27th of September, 1877, and in the following terms:—

"I *Elizabeth Fleetwood* do hereby bequeath and leave to *James Beaumont* of (to whom I have willed my landed property) also all my personalty, such as cash, furniture, &c., to be applied as I have requested him to do."

The testatrix died on the 28th of September, 1877. *Margaret Heyes* died in the lifetime of the testatrix, leaving four children, who were Defendants to this action.

Peter Fleetwood was the sole next of kin of the testatrix.

According to an affidavit made by *James Beaumont*, who was a Defendant to the action, the circumstances attending the execution of the fourth codicil were shortly as follows:—

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On the 26th of September, 1877, *Beaumont* (who was at *Trouville*, in *France*) received a communication from the testatrix, in consequence of which he left *Trouville* and reached the residence of the testatrix at *Rainhill*, in the county of *Chester*, about 6 P.M. on the following day. He went to her room, and directly he got to her bedside she began to tell him of certain alterations which she wished to make in her will, and desired him to send for her solicitor, the Plaintiff *E. W. Woods*, "to make the needful alterations." He accordingly at once wrote for Mr. *Woods*, who lived at *Warrington*, but having no certain knowledge of the contents of her will, and thinking that something ought to be done which would enable effect to be given to her wishes in the event of her solicitor arriving too late to draw up a codicil, *Beaumont* proposed to the testatrix to give him "a written power to carry out the various wishes you have just expressed." The testatrix assented, and he took an old letter from her dressing-table and jotted down on it in pencil a memorandum of her bequests, repeating each item to her before writing it down. The memorandum was as follows:—

"To pay out of cash in hand:

Mrs. *Sidgreaves*	£400
Robert Fleetwood, Kirby . .	500
Kiernan	10
Fisher	10
Masses Inst.	10

Miss *Tat. Chest.*, brooch, best ring, pearls.
Funeral, &c.
Furniture, Misses *Head.*"

Beaumont then went downstairs and wrote the fourth codicil, brought it up and read it over distinctly to the testatrix in the presence and hearing of the Defendant *Mary Head* and a Miss *Ashton*, whom he had asked to attend as witnesses to the execution of the codicil. He then asked the testatrix whether she had heard what he had read, and whether it correctly recorded her wishes. She said "yes," and then executed the codicil, her execution being attested by *Mary Head* and Miss *Ashton*. *Beaumont* shortly after asked her whether the silver went with the furniture, to which she replied, "No, that goes to your sister *Eliza*" (mean-

ing *Eliza Brewer*); "she is residuary legatee." Soon after this the testatrix went to sleep; a change for the worse took place in the night, and when her solicitor arrived on the morning of the 28th she was unable to attend to business, and in the afternoon she died. The memorandum was not signed by the testatrix; and *Beaumont* by his affidavit stated that "Mrs. *Sidgreaves*" named in the memorandum was the Defendant *Margaret Sidgreaves*; that "*Robert Fleetwood, Kirby*," was the *Peter Fleetwood*, of *Kirby*, who was mentioned in the will, but who had since died, and whose executors were the Defendants *Joseph Shepherd* and *Peter Fleetwood*; that "*Kiernan*" and "*Fisher*" were the Defendants *Thomas Kiernan* and *George Fisher*, who were Roman Catholic priests; that "Masses" meant that the testatrix desired to have £10 expended in saying masses for her soul; that "Inst." was a Roman Catholic institution, in the prayers of whose members the testatrix desired to be remembered, but to whom she did not desire to leave any pecuniary benefit; that "Miss *Tat. Chest.*" referred to one *Ann Tatlock*, of *Chester*; and that the "Misses *Head*" were the Defendants *Mary Head* and *Sarah Head*.

Beaumont also stated in his affidavit that he did not put down in the memorandum the legacy of £800 to *Thomas Clitheroe*, because he was sure it was included in the testatrix's will; and that he did put down the various legacies specified in the pencil memorandum because he did not know whether or not they were included in the will, which will he said he knew the testatrix had no intention to revoke.

George Fisher and *Ann Tatlock* disclaimed their legacies.

The object of the action was to have the rights of all parties ascertained and declared, and the principal questions argued were, first, whether, if a trust in *Beaumont* was sufficiently shewn, such trust could be carried into effect; and, secondly, if it could not be carried into effect—then (*a*) whether the fourth codicil entirely revoked as to personal estate the will and three previous codicils, so that *Beaumont* was trustee of the personalty for the next of kin; or (*b*) whether the will and three codicils continued in operation, so that *Beaumont* was trustee for the persons and objects therein named. There was also a question whether the fourth codicil comprised the entire personal estate of the testatrix.

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Kekewich, Q.C., and *Northmore Lawrence*, for the Plaintiffs, who were the executors of the testatrix.

Crossley, Q.C., for the Defendants *Eliza Brewer* and her husband, who were interested under the first and second codicils:—

The memorandum was not signed by the testatrix, nor does it appear that it was even shewn to her, and it is not referred to in the fourth codicil. A will may, no doubt, so refer to a separate document as to incorporate it; but it is essential, as was said by Lord *Cairns*, L.C., in *Singleton* v. *Tomlinson* (1), that the document must, first, "be clearly identified by the description of it given in the will, and secondly, that it must be shewn to have been existent at the time when the will was made": *Watson's* Comp. of Equity (2); *In the Goods of Pearse* (3). This memorandum cannot therefore be looked at; nor can the parol evidence of Mr. *Beaumont* be admitted. Moreover, the fourth codicil contains no revocation of the will and prior codicils, nor any residuary bequest, but merely purports to give or appropriate out of the personalty certain specific properties, which properties, as the attempted gift or appropriation fails, fall into the residue again, and pass under the residuary gift in the prior testamentary instruments.

[He also referred to *Briggs* v. *Penny* (4) (which he distinguished), and to *Irvine* v. *Sullivan* (5).]

W. Pearson, Q.C., and *Giffard*, for the Defendants *Margaret Sidgreaves* and *Thomas Sidgreaves*, her husband (who were interested both under the will and first codicil, and under the fourth codicil and memorandum), and for the Defendant *Thomas Clitheroe* (who was interested under the will and second codicil), and for the Defendants the Rev. *T. Kiernan* and the Misses *Head* (who were interested under the fourth codicil and memorandum only):—

On behalf of Mr. and Mrs. *Sidgreaves* we contend in the alternative that the fourth codicil does not revoke the prior testa-

(1) 3 App. Cas. 404, 414.
(2) Page 1172.
(3) Law Rep. 1 P. & M. 382.
(4) 3 Mac. & G. 546.
(5) Law Rep. 8 Eq. 673.

mentary gifts, or else that an effectual trust has been created in *Beaumont.* The only gift in the fourth codicil is of such personalty as is properly described by and included in the words "cash, furniture, &c.," and such a gift does not comprise, and cannot pass, the whole of the personal estate: *Beales* v. *Crisford* (1) and *King* v. *George* (2). But if, upon the true construction of the fourth codicil, the whole personal estate of the testatrix is comprised in it, then that codicil does not effectually revoke the clear beneficial gifts comprised in the prior testamentary instruments, because it contains no express revocation of them, but only at the most such a revocation as can be inferred from a subsequent inconsistent disposition; and that inconsistent disposition having failed, there is no revocation at all: *Briggs* v. *Penny* (3); *Irvine* v. *Sullivan* (4); *Jarman* on Wills (5); *Barclay* v. *Maskelyne* (6); *Alexander* v. *Kirkpatrick* (7). But if it should be held that the fourth codicil does revoke the previous testamentary instruments, then, the effect of the fourth codicil having clearly been to create a trust of some kind in *Beaumont,* parol evidence is admissible to shew the nature and objects of the trust so created: *Crook* v. *Brooking* (8); *Pring* v. *Pring* (9); *Smith* v. *Attersoll* (10); *Podmore* v. *Gunning* (11); *Irvine* v. *Sullivan.* In this case the trustee has shewn the nature of the trust by his own evidence, and by the memorandum, which is in fact a contemporaneous written declaration of trust.

As to *Mary Head,* she is entitled to her share of the furniture under the parol trust, notwithstanding that she was an attesting witness to the codicil.

Ingle Joyce, for the Defendants the children of *Margaret Heyes* who were interested under the will, adopted the same arguments so far as they were applicable, and contended that the fourth codicil did not revoke the previous testamentary dispositions, and

(1) 13 Sim. 592.
(2) 4 Ch. D. 435; 5 Ch. D. 627.
(3) 3 Mac. & G. 546.
(4) Law Rep. 8 Eq. 673.
(5) Vol. i. pp. 158, 162.
(6) Joh. 124.
(7) Law Rep. 2 H. L., Sc. 397, 402, 404.
(8) 2 Vern. 50, 106.
(9) Ibid. 99.
(10) 1 Russ. 266.
(11) 7 Sim. 644.

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that in the result *Beaumont* was created a trustee, but was a trustee for the beneficiaries under the will and three first codicils. He referred to *Morice* v. *Bishop of Durham* (1) and *Russell* v. *Jackson* (2).

Hastings, Q.C., and *Tweedy*, for the next of kin of the testatrix:—

The fourth codicil is a good revocation of the previous testamentary instruments, and a valid gift of the entire personal estate of the testator to *Beaumont*. *Beaumont*, however, is to hold it only as trustee, and as the persons for whom he was constituted a trustee cannot be ascertained without parol evidence, which is inadmissible for the purpose, the trust is incomplete and indefinite, and fails, and, the will and three codicils being revoked, *Beaumont* can only hold the personalty for the next of kin of the testator, who must consequently take. *King* v. *George* (3) is an authority that words such as those used in the fourth codicil are sufficient to pass the whole personal estate. The *Wills Act* requires all wills to be in writing, and the *Statute of Frauds* requires all declarations of trusts to be in writing, and where a testator does not shew upon the face of his will who is to take, the omission cannot be supplied by parol without violating those statutes, unless fraud, for which those statutes are not to be used as instruments, is an ingredient in the case; and accordingly where parol evidence has been admitted, it has been in cases where the trustee against conscience endeavoured to retain the property for his own benefit: *Lewin* on Trusts (4); *Habergham* v. *Vincent* (5); *Podmore* v. *Gunning* (6); *Irvine* v. *Sullivan* (7); *McCormick* v. *Grogan* (8); *Aston* v. *Wood* (9); *Kronheim* v. *Johnson* (10); *Johnson* v. *Ball* (11). The old case of *Crook* v. *Brooking* (12), which was decided in 1689, is no authority for the admission of parol evidence in such a case as the present; and in *Pring* v. *Pring* (13), which was decided in the

(1) 9 Ves. 399; 10 Ves. 522.
(2) 10 Hare, 204.
(3) 4 Ch. D. 435; 5 Ch. D. 627.
(4) 7th Ed. pp. 54, 66.
(5) 2 Ves. 204; 4 Bro. C. C. 353.
(6) 7 Sim. 644.
(7) Law Rep. 8 Eq. 673.
(8) Ibid. 4 H. L. 82.
(9) Ibid. 6 Eq. 419.
(10) 7 Ch. D. 60.
(11) 5 De G. & Sm. 85.
(12) 2 Vern. 50, 106.
(13) 2 Vern. 99.

same year, and *Smith* v. *Attersoll* (1), decided in 1826, the trustee claimed to hold the property himself. Moreover, as to the latter case, Lord *Gifford*, M.R., by whom it was decided, misconceived the state of the law, for he founded his judgment on three cases—first upon *Crook* v. *Brooking* (2), where the question was not argued; secondly, on *Lord Inchiquin* v. *French*, which he misconceived, because he referred to the wrong report in *Cox* (3) instead of to the right one in *Ambler* (4); and thirdly, on *Metham* v. *Duke of Devon* (5), which was a case of a deed which might have been admitted to probate, and therefore no authority. We, therefore, claim the entire personal estate for the next of kin.

W. D. Rawlins, for Mr. *Beaumont*.

W. Pearson having referred to the additional case of *Attorney-General* v. *Dillon* (6),

The VICE-CHANCELLOR said that he should take time to consider his judgment.

May 3. HALL, V.C.:—

The fourth codicil of the testatrix gives to *James Beaumont* all her personalty, and I am of opinion that those words are not cut down by the words "such as cash, furniture, &c.," to some particular portions of the testatrix's personal estate. The words "all my personalty" are too clear to be cut down by such, to say the least, doubtful words as "such as cash, furniture, &c." The construction which I put upon the gift is, if authority be wanting, warranted by the case of *King* v. *George* (7).

I hold that the words of the fourth codicil express that *James Beaumont* was to hold all the personalty upon trust to apply it as she had requested him to do; that is, I hold that according to the words of the codicil *Beaumont* was to be a trustee of the whole, the case not being similar in that respect to *Irvine* v. *Sullivan* (8)

(1) 1 Russ. 266.
(2) 2 Vern. 50, 106.
(3) Vol. i. p. 1.
(4) Page 33.
(5) 1 P. Wms. 529.
(6) 13 Ir. Ch. Rep. 127.
(7) 5 Ch. D. 627.
(8) Law Rep. 8 Eq. 673.

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and the cases followed in the judgment in that case, but similar to *Briggs* v. *Penny* (1).

The testatrix having, as I hold, by the codicil expressly given all her personalty to *Beaumont* in effect upon trust, and left the trusts undisclosed in the codicil, the next of kin say it follows that he took upon trust for them. They say that the cases in which the Court has, as it has in many cases, supported trusts where the testamentary instrument does not refer in any way to the devisee or legatee taking upon trust, are inapplicable; there arising (as they say) immediately upon the testatrix's death, when trusteeship appears on the instrument, a trust for the next of kin, the *Wills Act* in such a case excluding effect being given to a trust to be ascertained by parol evidence. The present case arises upon a codicil, but I think it will be convenient at present to treat it as if it were a will. As against the next of kin it is contended that the trusts, although not actually shewn in the will, will, if sufficiently proved, have effect given to them; *i.e.*, the alleged difference between the case of a trust mentioned on the face of the will and a trust the existence of which is undisclosed is denied. I proceed to examine the authorities.

In *Crook* v. *Brooking* (A.D. 1688) (2) the testator gave £1500 to *Simon* and *Joseph Snow* to be by them disposed of on such secret trust as he had privately revealed to *Simon*, and directed that the execution of the trust should be left wholly to them, so that in case they should break their trust, yet that they should not be questioned for the same either in Law or Equity. *Simon* wrote a letter to *Joseph* stating what the trusts were. On the hearing it was agreed that the trust was "well and sufficiently declared by the letter." A question arose on the construction of the letter. By the decree of the Lord Chancellor *Jeffreys*, that question was determined: the direction containing a declaration that the trust was well declared by the letter; whether or not any trust was well declared was not argued, but the declaration I have mentioned was made. Upon appeal, the Lords Commissioners (A.D. 1689) (3) also gave effect to the trust, but varied the decree of the Lord Chancellor as to the construction of the letter.

(1) 3 Mac. & G. 546. (2) 2 Vern. 50.
(3) 2 Vern. 108.

In *Pring* v. *Pring* (A.D. 1689) (1) the testator appointed *A.*, *B.*, and *C.*, executors in trust, and it was held that the executors being only in trust, and it not being said for whom, the person might be averred, and two of the executors having by their answer confessed the trust, that it was the intent of the testator, and that he declared it a trust for the plaintiff (the wife), the Court decreed a trust for the plaintiff.

In *Smith* v. *Attersoll* (A.D. 1826) (2) the Master of the Rolls, Lord *Gifford*, before whom the case was twice argued, gave effect to an instrument signed by the testator's two sons contemporaneously with his will, declaring trusts of a legacy given to the sons in trust for certain purposes—which he declared had been fully explained to them. It was contended before me that the Master of the Rolls cited in his judgment the case of *Earl of Inchiquin* v. *French*, referring to it as reported in *Cox* (3), and that the report of that case in *Cox* is incorrect, as appears from the report of the same case in *Ambler* (4), according to which report the question as to whether there was a trust was not decided by reason of the absence of the alleged *cestui que trust*. It would seem that this is so although the decree as set out in *Cox* declared the trust. The case of *Smith* v. *Attersoll* has been referred to in subsequent cases.

In *Podmore* v. *Gunning* (5) the testator gave his estate to his wife absolutely, "having a perfect confidence she will act up to those views which I have communicated to her on the ultimate disposal of my property after her decease." The plaintiffs claimed, alleging that they were the persons whom the testator had intended to be beneficiaries. The case was elaborately argued. The Vice-Chancellor held that if the plaintiff's allegation had been proved the Court would have given effect to it as a trust, but he held it not to be proved.

In *Johnson* v. *Ball* (6) a testator gave a policy of assurance to two trustees "to hold" the same "upon the uses appointed by letter signed by them and myself." No such letter existed, but the testator had previously asked the trustees, who had consented

(1) 2 Vern. 99.
(2) 1 Russ. 266.
(3) Vol. i. p. 1.
(4) Page 33.
(5) 7 Sim. 644.
(6) 5 De G. & Sm. 85.

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to accept the bequest for the benefit of persons and objects then named by the testator. Long after the date of his will the testator wrote a letter, addressed to his executors, stating that he had, by his will, left the policy to the two trustees, to be delivered up to them for the purposes they had agreed to carry out. At the same time the testator signed an unattested memorandum declaring the trusts on which the trustees were to hold the policy given to them by his will. The trustees retained the letter and the memorandum until after the testator's death. Upon a claim by one of the persons beneficially interested under the memorandum against the executors and trustees, it was held that the testator could not prospectively create for himself a power to dispose of property by an instrument not duly executed as a will, and that the letter would not operate as a gift *inter vivos;* and that the trustees held the proceeds of the policy in trust for the residuary legatees under the testator's will. The decision in that case seems to me not open to question. The instrument referred to was one signed, or to be signed, by the testator and by the trustees, there not being any such instrument existing before the date of the will forthcoming, and no such instrument being afterwards signed. Parol communications with the trustees before the date of the will were excluded by the testator requiring an instrument signed as he mentioned, and the testator's signing an instrument himself after the will was an attempt to regulate the trusts by an instrument not duly attested as required by the statute. The Vice-Chancellor said in the course of his judgment (1), "Cases in which there is no trust appearing on the will, and where the Court establishes a trust on the confession of the legatee, have no application to the present; nor, as it appears to me, have those cases cited in the argument, in which the will refers to a trust created by the testator by communication with the legatee antecedently to or contemporaneously with the will."

The Vice-Chancellor here distinguishes the case before him from, and does not call in question, but seems to recognise, the cases cited in the argument, in which a trust created by the testator by communication with the legatee had been established. Among the cases cited to the Vice-Chancellor were *Pring* v. *Pring* (2),

(1) 5 De G. & Sm. 91. (2) 2 Vern. 99.

Crook v. *Brooking* (1), and *Smith* v. *Attersoll* (2). Subsequently to *Johnson* v. *Ball* (3), Vice-Chancellor *Wood* held, in *Moss* v. *Cooper* (4), that a trust by communication with the legatee might be created by such a communication subsequently to the date of the will.

In *Irvine* v. *Sullivan* (5) a testator, after a devise of all his real and personal estate to *A.*, *B.*, and *C.* (whom he afterwards appointed as his executors) upon trust to sell, directing that the "moneys arising from the said sale, and otherwise forming or representing my estate and effects after payment of my just debts and funeral and testamentary expenses and the expenses of carrying out the trusts of this my will, shall be paid by my said trustees, and I hereby give and bequeath the same to *D.* absolutely, trusting that she will carry out my wishes with regard to the same, with which she is fully acquainted." The testator had, shortly before the date of his will, expressed to *D.*, to whom he had been for some time engaged to be married, his wish that she would, out of the property which he should leave her, make gifts to certain persons. *D.* wrote down, after leaving the testator, his wishes, but the paper was not submitted to or signed by him. It was held by Vice-Chancellor *James* that *D.* took the residue of the testator's estate beneficially, subject only to the performance of the testator's wishes communicated to her, which were treated as legacies carrying interest at 4 per cent. from the expiration of one year from testator's death.

The decision was that the words used did not create a trust, and there was not any evidence of trust except that the plaintiff in her bill admitted intended gifts of legacies amounting to £9000. Evidence that the testator intended a beneficial gift to the plaintiff was rejected. No opinion was expressed as to how the case would have stood as regards the estate other than the legacies had there been evidence of intended trust of it by communications with the general devisee, but effect was given to the intended beneficial disposition as far as it was admitted by the Plaintiff. The question in the present case did not arise. The Vice-Chancellor in his judgment said (6): "If the words here amounted on a fair construction to what was said in *Briggs* v. *Penny*, if it was a gift to

(1) 2 Vern. 50.
(2) 1 Russ. 266.
(3) 5 De G. & Sm. 85.
(4) 1 J. & H. 352, 367.
(5) Law Rep. 8 Eq. 673.
(6) Ibid. 678.

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Mrs. *Irvine* 'upon trust to carry out my wishes with regard to the same, with which she is fully acquainted,' I should hold it would be utterly impossible that she could take anything beneficially, and then the wishes not being manifested in such a way as that this Court can take notice of them, the trust would have failed for the benefit of the heir-at-law." As I read that passage the Vice-Chancellor thought that there might have been evidence which would have supported a trust. But in fact there was not any such evidence.

In *Riordan* v. *Banon* (1) a will directed a pecuniary legacy to be disposed of by the legatee in a manner of which he alone should be cognizant, and as contained in a memorandum which the testator should leave with him. It was proved by parol evidence that before the execution of the will the testator had verbally informed the legatee that he intended to bequeath the legacy in trust for a person whom he then named, and that the legatee had consented to accept the legacy for this purpose, and had promised the testator to carry out his wishes respecting it. The residuary legatees of the testator having claimed the benefit of the legacy, it was held by the Vice-Chancellor that a valid trust for the person named by the testator had attached to the bequest. The Vice-Chancellor held that parol evidence was admissible to prove that a legacy had been bequeathed upon a trust entirely or partially undisclosed upon the face of the will when at or before the execution of the will the trust had been communicated by the testator to the legatee, and had been accepted by the latter. The Vice-Chancellor referred to the cases I have mentioned, and he said, "The result of the cases appears to me to be that a testator cannot by his will reserve to himself the right of disposing subsequently of property by an instrument not executed as required by the statute, or by parol; but that when at the time of making his will, he has formed the intention that a legacy thereby given shall be disposed of by the legatee in a particular manner, not thereby disclosed, but communicated to the legatee and assented to by him at or before the making of the will, or probably, according to *Moss* v. *Cooper* (2), subsequently to the making of it, the Court will allow such trust to be proved by

(1) 10 Ir. Eq. Rep. 649. (2) 1 J. & H. 367.

admission of the legatee, or other parol evidence, and will, if it be legal, give effect to it. The same principle which led this Court, whether wisely or not, to hold that the *Statute of Frauds* and the *Statute of Wills* were not to be used as instruments of fraud, appears to me to apply to cases where the will shews some trust was intended, as well as to those where this does not appear upon it. The testator, at least when his purpose is communicated to and accepted by the proposed legatee, makes the disposition to him on the faith of his carrying out his promise, and it would be a fraud in him to refuse to perform that promise. No doubt the fraud would be of a different kind if he could by means of it retain the benefit of the legacy for himself; but it appears that it would also be a fraud though the result would be to defeat the expressed intention for the benefit of the heir, next of kin, or residuary donees."

In the argument before me *Attorney-General* v. *Dillon* (1) was referred to. In that case, however, it was held in effect that there was not a trust created by the codicil. Trusts were, however, established by parol evidence. Some observations of the Lord Chancellor seem to refer to the question in the present case, but he does not appear to me to have given any definite opinion upon that question; only one of the cases above mentioned was cited, and no one of them was mentioned in either of the judgments. The Lord Justice of Appeal did not in his judgment refer to the question in the present case.

In the argument before me it was said that the jurisdiction of the Court was altogether founded on personal fraud, the Court only depriving the legatee of what he would otherwise retain beneficially, and in particular the judgment of Lord *Westbury* in *McCormick* v. *Grogan* (2) was referred to. That was a case in which there was not any reference to trust on the face of the will, and it was considered that the parol evidence relied on as creating a trust binding on the devisee and legatee did not make out a trust. The question therefore did not arise, although, no doubt, there are observations basing the doctrine on the ground of fraud, from which counsel have contended before me that where a trust appears on the will and the legatee can in no case take for himself, there can be no fraud, and therefore the doctrine does not

(1) 13 Ir. Ch. Rep. 127, 133. (2) Law Rep. 4 H. L. 82.

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apply. Not one of the cases which I have referred to was mentioned either in the arguments or judgments in that case. I cannot treat either or both of those two cases of the *Attorney-General* v. *Dillon* (1) and *McCormick* v. *Grogan* (2) as establishing, contrary to the other authorities I have mentioned, that where trust is referred to on the face of the will, the Court will not give effect to the intended trust, although there is conclusive evidence upon which the Court would have given effect to the intended trust had the will been altogether silent as to trust.

In *Moss* v. *Cooper* (3) Vice-Chancellor *Wood* said: "If on the faith of a promise by *A.* a gift is made in favour of *A.* and *B.*, the promise is fastened on to the gift to both, for *B.* cannot profit by *A.'s* fraud." *B.* in that case takes, but is not allowed to hold although personally he has not been party to any fraud. In other words, relief is given against him, although not on the ground of his personal fraud; and *Russell* v. *Jackson* (4) and *Carter* v. *Green* (5) are also deserving of consideration on this point. In the present case the promise was the inducement to and created the gift. Can the Court allow a trust to arise for the next of kin under a gift obtained under such circumstances as existed in this case, the creation of the trust and the intended gift being contemporaneous, and thus there not being any interval allowing of any resulting trust for the next of kin? The declaration of trust was incorporated with the intended creation of the trust. This question of personal fraud was urged in some of the cases I have above mentioned, which are authorities for sustaining the validity of the trusts. In *Riordan* v. *Banon* (6) the Vice-Chancellor specifically examined and dealt with the question of personal fraud.

My conclusion on this part of the case is that the Court should and will execute the trusts intended to be reposed in the trustee *Beaumont* by the testatrix, if the trusts be established in evidence. I am of opinion that they are. I think that Mr. *Beaumont's* evidence establishes that the testatrix's property became vested in him on trust to carry out the dispositions in the will, and first, second, and third codicils, with the alterations communicated to *Beaumont* by the testatrix, such alterations being the new dispo-

(1) 13 Ir. Ch. Rep. 127.
(2) Law Rep. 4 H. L. 82.
(3) 1 J. & H. 367.
(4) 10 Hare, 204.
(5) 3 K. & J. 591.
(6) 10 Ir. Eq. Rep. 649.

sitions Mr. *Beaumont* specifies in his affidavit. I think that, as all the testatrix's property was given to him, and the evidence shews the testatrix did not intend to alter her previous dispositions, except to give effect to her wishes as stated to Mr. *Beaumont*, it is made out that he was a trustee to give effect to the testatrix's dispositions.

Assuming that I am wrong in holding that the Court can and will give effect to the intended trusts, the effect of the failing of the trusts intended to be reposed in *Beaumont* is, I think, that the original dispositions in the will and first, second, and third codicils remain in operation. There is not in the fourth codicil any express revocation of the will and first, second, and third codicils; and the fourth codicil being executed in order to create new interests, which fail, the original instruments of disposition remain unaffected, on the principle of *Onions* v. *Tyrer* (1), and other cases (2). The case of *Alexander* v. *Kirkpatrick* (3) was referred to on this head. The case itself is not like the present, but there are passages in the judgment supporting the opinion I have expressed. As regards the intended gift of £10 for masses, it seems to be void on the authority of *West* v. *Shuttleworth* (4); *Heath* v. *Chapman* (5); *In re Michel's Trusts* (6); *In re Blundell's Trusts* (7). Miss *Mary Head*, one of the attesting witnesses to the fourth codicil, being intended to be a beneficiary under the parol trust declared of the furniture, I think that the trust for her and her sister fails as to her beneficial interest, as it would have done had the trust been declared in the codicil, and that she and her sister being joint tenants of the beneficial interests of the furniture, the whole belongs to the sister.

There should be declarations in the judgment to give effect to what I have stated above.

Solicitors: *Gregory, Rowcliffes, & Rawle; Clarkes, Rawlins, & Clarke; Hunt & Son*, agents for *Gibbs & Llewellyn, Newport, Monmouthshire.*

(1) 1 P. Wms. 343; Prec. Ch. 459.
(2) Jarman on Wills, vol. i. pp. 127, 137.
(3) Law Rep. 2 H. L., Sc. 397.
(4) 2 My. & K. 684.
(5) 2 Drew. 417.
(6) 28 Beav. 39.
(7) 30 Beav. 360.

V.-C. H.
1880
June 17.

HERBERT *v.* WEBSTER.

[1880 H. 82.]

Remoteness—Restraint on Anticipation.

17 Ch D 311.2

By indenture made in December, 1874, *S.* and *J. S.*, wife and husband, who had at the date of the indenture been married many years, and had two children, daughters, both married, assigned to trustees a sum of money in trust to invest for the benefit of the settlors, and after their deaths the trustees were to stand possessed of the moneys upon trust for their children as they or the survivor should appoint, and in default of appointment for all the children or any the child of *S.* by *J. S.* who being a son should attain twenty-one, or being a daughter should attain twenty-one or marry under that age, if more than one in equal shares, and if daughters for their separate use, and without power to alienate or anticipate the same. There were no other children of the marriage. *S.* died in 1876, and *J. S.* in 1879, without having made any appointment:—

Held, that, notwithstanding the rule against perpetuities, the shares of the two daughters were subject to restraint on anticipation.

In re Michael's Trusts (1), *Buckton* v. *Hay* (2), and *Wilson* v. *Wilson* (3) considered.

SPECIAL CASE under the statute 13 & 14 Vict. c. 35. By an indenture made on the 31st of December, 1874, *Sarah Sharpe* (who died in 1876) and *John Sharpe* (who died in December, 1879), who had at the date of the deed been married many years, and had two children living, viz., the Plaintiff *Emily Herbert*, the wife of *William John Herbert* (a Defendant), and *Hannah Martha Mary*, the wife of *Edward Horsfall Mottershead* (both Defendants), assigned unto two trustees, their executors, administrators, and assigns, a sum of £2000 upon trust to receive and invest the same in the manner therein mentioned, and to pay and apply the interest, dividends, and income of the securities representing the same in the manner therein mentioned, during the lives of the said *Sarah Sharpe* and *John Sharpe*, and the survivor of them: and it was declared that after the death of *Sarah Sharpe*, and the failure or determination of certain trusts declared in favour of *John Sharpe*, which trusts determined upon his death, the trustees should stand possessed of the trust moneys and securities and the

(1) 46 L. J. (Ch.) 651. (2) 11 Ch. D. 645.
(3) 4 Jur. (N.S.) 1076.

income thereof upon trusts for the benefit of the children of *Sarah Sharpe* by the said *John Sharpe* as the said *Sarah* and *John Sharpe* should by deed jointly, or as the survivor of them should by deed or will or codicil appoint: and the deed provided that, in default of appointment, the trust moneys and securities and the income thereof should be held "in trust for all the children or any the child of the said *Sarah Sharpe* by the said *John Sharpe* who being sons or a son shall attain the age of twenty-one years, or being daughters or a daughter shall attain that age or marry under that age, or if more than one in equal shares, but if daughters for their sole and separate use free from the control and debts of their present or any future husband, and so that during their present or any future coverture they shall have no power to alienate or anticipate the same or any part thereof." The indenture contained provisions for the advancement and maintenance of any "child or other issue of the said marriage."

The two daughters, at the date of the deed, were both married, and there were no more children living.

The power of appointment reserved to the wife and husband jointly, and to the survivor, was never exercised.

The question submitted for the opinion of the Court was whether the two daughters were now entitled to the trust moneys and securities in equal shares for an absolute interest and free from the restraint on anticipation.

P. B. Lambert, for the Plaintiff, submitted that the restraint on anticipation could not take effect, for the reason that it was so expressed as to be applicable to all children of the settlors; and that the whole clause must be rejected, because it transgressed the rule against perpetuities. In *In re Michael's Trusts* (1), a clause restraining anticipation in a gift to a class which might include in it some who at the time of the gift were unborn was held to be invalid.

[HALL, V.C., referred to *Buckton* v. *Hay* (2).]

There the Master of the Rolls had the same question before him, and held that the restraint on anticipation was void. It is submitted that these decisions ought to be followed.

(1) 46 L. J. (Ch.) 651. (2) 11 Ch. D. 645.

2 R 2 1

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G. W. Lawrance, for the trustees, Defendants, referred to the case of *Wilson* v. *Wilson* (1) and *Theobald* on Wills (2), and submitted that the decision of Vice-Chancellor *Wood* governed this case. The Master of the Rolls had not that case before him in *Buckton* v. *Hay* (3), and that was unfortunate, as he seemed to have reluctantly come to the conclusion that the rule against perpetuities was infringed. The principle of that case applied to the present, and the question whether the daughters were absolutely entitled should be answered in the negative.

P. B. Lambert, in reply, referred to *Armitage* v. *Coates* (4), and submitted that the bulk of the authorities since 1865 were in favour of an answer in the affirmative.

Jason Smith appeared for the other Defendants.

HALL, V.C.:—

The authorities differ upon the question raised in this case. The decision of Vice-Chancellor *Wood* I consider to be an authority in favour of the restraint on anticipation, certainly as to those persons who were *in esse* at the date of the settlement or death of the testator, and in the case before Vice-Chancellor *Wood* it was the death of the testator. Some of the children of *Isaac Lawrence,* the person named in the will, being then born, the Vice-Chancellor said he saw no reason why they should not be restrained from dealing with their aliquot shares, which could be and were ascertained in amount at the death of the testator. That being so, there was no reason, in regard to perpetuity, why the share in that case should not be settled. There was no question of convenience, or as to the division of the fund, or otherwise, which required the Court not to give effect to what was directed in regard to the other shares. It could not be disputed that if the testator had said, as to any of such children born in his lifetime, their shares, as to separate use, should be subject to restraint on anticipation, it would have been so held. Why should there not have been a gift such as that? There would have been nothing illegal in it,

(1) 4 Jur. (N.S.) 1076.
(2) Pages 298–305.
(3) 11 Ch. D. 645.
(4) 35 Beav. 1.

and nothing which transgressed the rules against perpetuities. Why should not the Court give effect to what the testator said? I consider the decision ought to be followed, unless there be authorities subsequently to it which I must follow. The authorities, which are subsequent, are the case of *In re Michael's Trusts* (1), before me, and the case of *Buckton* v. *Hay* (2), before the Master of the Rolls. The case before me is very shortly reported. The point that some of the children were actually born before the testator died does not appear to have been drawn to the attention of the Court, and it is only by referring to the dates that I can collect how the facts stood, and then only by looking at the dates of the marriages and the date of the death of the testator. He died in 1854, and the child who applied to the Court was married in 1853, therefore before the death of the testator. She was living at the testator's death, and at the time when his will came into operation. It seems to me that the decision in that case is unsatisfactory. In *Buckton* v. *Hay* the Master of the Rolls appears to have thought that such trusts ought to be considered as outside the rules against remoteness, and as not affected by them. I think that I am in a position to follow the decision of Vice-Chancellor *Wood* in *Wilson* v. *Wilson* (3), and therefore I answer the question submitted by holding that the shares of the two daughters are subject to restraint on anticipation. The costs of all parties must come out of the fund.

Solicitors: *Ewart Jukes; J. B. Kelly.*

(1) 46 L. J. (Ch.) 651. (2) 11 Ch. D. 652.
(3) 4 Jur. (N.S.) 1076.

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1880]

July 23, 24, 26.

CHAMBERLAIN *v.* NAPIER.

[1871 C. 166.]

Contract of Marriage made in Scotland—English Husband and Scotch Wife—English Real Estate and Personalty—Trusts in English and Scotch Forms—Lex Loci—Intention of the Parties—Power of Appointment—"Such Child or Children"—Exclusive Power.

A contract of marriage was executed in *Scotland* (where the marriage took place) by a domiciled Englishman described as residing in *Scotland*, and a Scotchwoman described as residing there, and whose domicile was Scotch. Trusts were declared of English real property of the husband in English form, and of personalty in *Scotland* belonging to the wife in Scotch form:—

Held, that the trusts of the husband's property were to be construed by English law.

The trusts of the husband's property were for the husband for life, and after his death for the wife for life, and after the death of the survivor for "such child or children" of the marriage, and if more than one, in such shares as the husband and wife or the survivor should appoint:—

Held, that it was an exclusive power, and that an appointment by the wife, who survived, of the whole of the property in favour of the eldest son of the marriage was valid.

IN 1857, Sir *Henry Orlando Robert Chamberlain*, Bart., and Miss *Marion Wilson* intermarried in *Scotland*. Both husband and wife having died, the former in December, 1870, and the latter on the 13th of July, 1871, the five infant children of the marriage in July, 1871 (by their next friend), all at that time residing at *Gresham House, Anerley, Surrey*, instituted a suit against the eight trustees (five of whom were out of the jurisdiction), praying for the execution by the Court of the trusts of the contract of marriage made and executed ("signed, sealed, and delivered in duplicate" by the intended husband and wife, and *Alexander Christie* and *Robert Aitken*, all at *Glasgow*, upon the 27th day of January, 1857, before two witnesses, named) by and between Sir *H. O. R. Chamberlain*, Bart., residing at *Hamilton*, and captain in the 1st Regiment of *Lanarkshire* Militia, of the first part, and *Marion Wilson*, residing at *Croy Cottage, Dumbartonshire*, daughter of the late *John Wilson*, Esq., of *Dundyvan*, of the second part.

It appeared that Sir *H. O. R. Chamberlain* was born at *Barba-*

does in 1828; was christened at *Woolwich* in May of that year; that he was in 1844 gazetted as ensign in the 23rd Regiment (Welsh Fusileers), and sold out in 1854; that in June, 1855, he accepted a commission in the *Lanarkshire* Militia, and was gazetted captain in 1856 and major in 1857; also that after his marriage in February, 1857, he and his wife travelled on the continent, returning to *Great Britian* in August, 1857; that his eldest child was born at *Douglas, Isle of Man*, in November, 1857; that he visited many places in *Scotland;* that he resigned his commission in the militia in 1861; and that in 1868 he and his wife went on another tour on the continent, and that he died at *Bruges* in December, 1870.

Alexander Christie and *Robert Aitken* were the surviving trustees of *John Wilson's* trust disposition, after mentioned.

The contract contained recitals to the effect that by and under the will of his grandfather, and a settlement executed in pursuance thereof, a freehold messuage known as the *Axe* or *Hatchet* public-house, situate in the *Hackney Road, Middlesex*, was conveyed to two trustees for a term of years, determinable as therein mentioned, upon trust to secure the payment of an annuity, and subject to the life interest of the settlor's wife, for the settlor's son for life, with remainder to his first and other sons in tail; and that a sum of £10,000 was bequeathed to the same trustees upon trust to purchase a freehold estate in *England* or *Wales*, which was to be settled the same as the messuage in the *Hackney Road* was, and until it was so laid out it was to be invested upon Government or real securities in *England* or *Wales:* also that the £10,000 had been invested in the purchase of £11,004 *2s. 6d.* £3 per Cent. Consols, and that it was standing in the names of the two trustees of the will—the testator's widow and *Vere Fane* of *Fleet Street, London:* and that in the event which had happened (the death of his father) Sir *H. O. R. Chamberlain* had become tenant in tail of the property expectant on the determination of the life interest of his grandmother.

There were then recitals which shewed in effect that under the trust disposition, and deed of settlement, dated in June, 1846, of her father, *Marion Wilson* was entitled, under the trusts stated, to a "life rent alimentary use allenarly" in a sum of £10,000, and

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after her death to her issue in fee in equal proportions upon attaining majority (sons), or majority or being married (daughters). It was declared that the life rent should not be subject to the *jus mariti* or right of administration, or be affectable by the debts or deeds of the husband, the same being thereby expressly excluded and debarred; and also declared that she should have no power to affect the principal by her debts or deeds, except that she might apportion it amongst her issue in any such shares as she might deem proper, and also in case of dying without issue she might test upon the same, and so dispose thereof *mortis causa:* that by a codicil *John Wilson* bequeathed to his said daughter and her issue a further legacy of £10,000, payable at the terms with interest and penalties and on the conditions therein specified: that by the death of her sister *Janet, Marion Wilson* had become entitled to a fourth part of £20,000; and that a marriage had been agreed upon by and between the said contracting parties hereto. The contract then proceeded: "Therefore the said contracting parties hereto have agreed with each other as follows:—In the first place, the said Sir *H. O. R. Chamberlain* and Miss *Marion Wilson* have agreed to accept and do hereby accept of each other as lawful spouses, and promise to solemnize their marriage with all convenient speed. In the second place, in contemplation of the said marriage, and in consideration of the premises, the said Sir *H. O. R. Chamberlain* doth hereby covenant and bind, and oblige himself, his heirs, executors, and administrators, and doth hereby expressly covenant with the hereafter named trustees" (six in number, four of whom were Scotchmen residing in *Scotland*, one resident in *England*, and the other in *Ireland*), "their heirs, executors, administrators, and assigns, that as soon as may be after the solemnization of the said marriage he" would execute a disentailing assurance by which the estate tail vested in him in the messuage in the *Hackney Road* should be converted into a base fee; and the estate tail or *quasi* estate tail vested in him in the sum of £11,004 2*s.* 6*d.* £3 per Cent. Consols, "or the securities or heritages in or upon which the same" might be invested should be converted into a base fee or *quasi* base fee, and by which the base fee in the messuage, and base fee or *quasi* base fee in the consols, should "be vested in" the six trustees, "their

executors, administrators, and assigns, according to the nature of the premises respectively upon the trusts hereinafter mentioned," and that he would, after the death of his grandmother (the tenant for life), or with her consent, execute such further assurance as should be necessary "for converting the estates or interests so to be vested by way of base fee or *quasi* base fee in the same trustees, their heirs, executors, administrators, or assigns, into absolute estates or interests," but subject to the trusts under the term of years; and it was agreed that the trustees (the same six), their heirs, executors, or administrators, should "stand and be seised and possessed of the heritages and real estate" and "securities and personal estate" which should become vested in them upon trust that they should at such times, after the decease of the tenant for life, as should be deemed expedient, sell such of the trust premises as should "consist of legal real estate," and should (after such decease) cause to be transferred to themselves such of the trust premises as should "consist of legal personal estate," and should "also sell or dispose of such, if any, of the same respective trust premises consisting of the legal personal estate as shall not consist of or be invested in such stocks or shares as" were thereinafter directed in relation to the investment of trust funds and estate, and should invest the clear moneys to arise from such sales as were therein "before directed to be made of legal real and legal personal estate respectively, or cause the same to be" invested in the names of the trustees thereinafter referred to, and should likewise transfer such of the same respective trust premises as should consist of or be invested in such stocks or shares as were thereinafter directed in relation to the investment of trust funds and estate to or into the names of the trustees thereinafter "named and designed and appointed to act under this marriage contract in the 3rd and 4th articles thereof, and the survivor and acceptor of them, and such other person or persons as they shall assume in virtue of the power hereinafter conferred upon them, a majority of such trustees being always a quorum, and their heirs, executors, administrators, or assigns, upon the trusts hereinafter declared of or in relation to the same several trust premises respectively, and with the same powers and privileges as regards the same trusts as are hereinafter conferred upon them as regards the other trusts

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constituted under the 3rd and 4th articles of this contract." And it was declared that the assurances so to be made by Sir *H. O. R. Chamberlain* should contain the following provisions and powers, viz., that all sales might be made either by public auction or private contract, and subject to such conditions as to title "as the trustees should think proper, with power to buy in the premises or rescind the contracts without being responsible for loss, and after the decease of the tenant for life the rents and profits of the trust premises as should consist of real estate should be applied in the same manner as the income of the money arising from the sale thereof, or arising from the investment of such money, would be applicable in case such real estate were sold." In case of trustees dying, or refusing to act, or going to reside abroad, it should be lawful for Sir *H. O. R. Chamberlain* and *Marion Wilson*, during their joint lives, and for the survivor, and, after the decease of the survivor, for the trustees of such assurances, by deed to be sealed and delivered, to appoint other trustees in their place, and the new trustees should have the same powers as the original trustees had. And it was "declared that the trustees hereafter named and assigned and appointed to act under this marriage contract in the 3rd and 4th articles thereof, and the survivors and acceptors" of them, and such other "persons as they shall assume in virtue of the powers hereinafter conferred upon them, a majority of the said trustees being always a quorum, and their executors," should hold the trust premises so to be transferred to or invested in their names upon trust to pay the annual income to Sir *H. O. R. Chamberlain* and his assigns during his life, and after his decease to pay the same to *Marion Wilson* (if then living) and her assigns during her life, and after the decease of the survivor to hold the trust premises and the annual income thereof "in trust for such child or children of the said intended marriage, and if more than one in such shares and in such manner and form, and to vest at such time or times, and to be subject to such powers and restrictions as" Sir *H. O. R. Chamberlain* and *Marion Wilson* should "by their joint deed or deeds, or as the survivor shall by his or her deed or deeds or by will or codicil appoint, and in default of such appointment to hold" the trust premises "in trust for such of the children of the said intended marriage" as being sons should

attain the age of twenty-one years, or being daughters should attain that age or be married under that age with consent of their guardians, "if more than one such child in equal shares, with the usual powers for advancement, maintenance, and accumulation according to the law of *England*," and should no son of the intended marriage attain the age of twenty-one, and should no daughter thereof attain that age or marry with such consent, then to hold the trust premises upon such trusts as Sir *H. O. R. Chamberlain* should by deed or will appoint, and, in default of such appointment, as *Marion Wilson*, if she should survive him, should after his decease appoint, and in default of either such appointment to hold all the trust premises "in trust for the said Sir *H. O. R. Chamberlain*, his executors, administrators, and assigns, which eventual provision hereinbefore conceived in favour of *Marion Wilson*, if and when the same becomes available so as to insure to her in the event of her surviving the said Sir *H. O. R. Chamberlain* a life interest in the trust premises to which the same provision relates, shall be and is hereby accepted by her in full of all legal claims competent to her or her heirs, executors, or successors whomsoever against the said Sir *H. O. R. Chamberlain*, or his heirs and successors or means and estate, by and through his decease." In the third place, in further contemplation of the said marriage and in consideration of the premises, *Marion Wilson*, in virtue of the powers conferred by her father's trust disposition and deed of settlement, did, with consent of Sir *H. O. R. Chamberlain*, her intended husband, and with the approval of *Alexander Christie* and *Robert Aitken*, the only surviving accepting and acting trustees, original and assumed, of the deceased *John Wilson* under the trust disposition and deed of settlement, and who subscribed these presents in token of such approval, appoint *James Robert Napier* and the five other persons named (the same six as previously appointed), and the survivors and acceptors of them, and such other persons as they should assume in virtue of the powers thereinafter conferred upon them, a majority being always a quorum, as trustees in whose names should be invested and secured the foresaid first-mentioned legacy of £10,000, declaring always that the said legacy should be held in trust, and applied for behoof, and in all respects in the terms specified in the

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said trust disposition and deed of settlement, and not otherwise. And in the fourth place, in further contemplation of the marriage, and in consideration of the premises, *Marion Wilson* did, with consent of Sir *H. O. R. Chamberlain*, assign, dispone, transfer, convey, and make over from her heirs, executors, and successors whomsoever, to and in favour of the said *James R. Napier* and the other five persons named, and the survivors and acceptors of them (the same language was used as above), as trustees, for the ends, uses, and purposes thereinafter expressed, and to their assignees whomsoever, the whole means, estate, and effects, heritable and moveable, real and personal, presently belonging to her or which she should thereafter acquire or succeed to in any manner of way, with the whole writs, title-deeds, vouchers, and instructions thereof, and particularly without prejudice to said generality, all and whole the principal sum of the foresaid sum of £10,000 bequeathed to her as aforesaid by her father, as also all and whole the fourth share belonging to her as one of the four next of kin of her deceased sister, together with all rights and interests competent to her under her father's trust disposition and deed of settlement with the said trust disposition and deed of settlement themselves in so far as relating to the legacies surrogating and substituting the said trustees and their foresaids in her full right and place of the premises, with full power to receive and discharge or assign and convey the means and estate thereby generally and particularly conveyed, as fully and effectually as *Marion Wilson* could do herself before the granting thereof, excepting and reserving always from the foregoing conveyance all interest and arrears of interest which should be due on the foresaid two legacies and share as next of kin as at the date of the intended marriage. "But in trust always, and for the ends, uses, and purposes following, viz.: first, for payment of the expenses of this trust; and, secondly, the said trustees shall hold the said several sums and means, and estate" thereby conveyed "in trust for behoof of" *Marion Wilson* "in life rent, and on her death for behoof of" Sir *H. O. R. Chamberlain* "if he shall survive her. Also in life rent for her respective life rent use allenarly, and excluding, so far as regards the life rent of" *Marion Wilson*, "the *jus mariti* and right of administration of her said intended husband or of any other husband whom she may marry, and for behoof of the

child or children of the said presently intended marriage in fee, in such shares or proportions if more than one child as the said intended spouses or the survivor of them shall appoint by any writing under their, his, or her hand, and in default of such appointment, then equally between or among the said children, share and share alike. Provided always that it shall be competent to and in the power of" *Marion Wilson*, "by any writing under her hand, and without the consent of her said intended husband, to direct and appoint the said trustees to pay or convey a sum" not exceeding £3000 of the capital sums, "after the death of the longest liver of the spouses," to such persons "other than the child or children of the said intended marriage as she shall see fit, and in default of children of the said intended marriage surviving" *Marion Wilson*, "then the fee of the said means and estate thereby conveyed in the fourth place shall be paid or conveyed to such person or persons as" *Marion Wilson* "shall have appointed by any will or testamentary writing under her hand, and in default of such appointment, then to the nearest heirs and representatives whomsoever, according to the law of *Scotland*, of" *Marion Wilson*; "and for enabling the said trustees the better to carry the purposes of this trust into effect so far as regards all and every of the trusts hereinbefore constituted, the following powers and privileges are hereby conferred upon them, viz., to uplift and discharge or to assign and convey the trust funds and estate, and also to invest the same on heritable or personal security, or in government, bank, canal," &c., or other shares as therein mentioned, "as also to realize the investment from time to time and reinvest as aforesaid; as also, with the written approval of" *Marion Wilson* "by herself alone without the consent of her said intended husband, to invest such portion of the trust funds as she may direct in the purchase of heritable or real property in *Great Britain* or *Ireland*, the titles thereto being taken in favour of the said trustees and in strict accordance with these presents:" As also to appoint factors and law agents for the management of the trust funds and estate, with such allowance for their trouble as was usual or as the trustees should deem proper; as also to compound or compromise or submit to arbitration any claims or questions which might arise relating to the trusts; "as also from time to time to assume any

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other person or persons as trustees to act alongst with or in succession to the trustees herein named, and for the encouragement of the said trustees it is hereby provided and declared that they shall not be liable *singuli in solidum*, but each for his own intromissions only, and that they shall not be liable for the solvency of any party or parties to whom they may lend the said trust funds, or with whom they may transact in reference to the same, further than that such party or parties were habit and repute solvent at the time of lending or transacting." Nor should be liable for factors or law agents who might be appointed by them, nor be liable for any loss or depreciation in the investments of the funds; and it should be competent to any of the trustees to resign the office of trustee "on giving three months' previous notice in writing of their intention so to do to their co-trustees," or in default of such trustees to the beneficiaries. And it was declared "that debtors, or other parties transacting with the said trustees, should have no concern with the purposes of this trust, but should be exonered by the simple discharge or other writ of the said trustees." And it was "agreed upon and declared that although the said marriage shall be dissolved within a year and a day after the solemnization thereof without a living child having been procreated of the same, yet this contract and whole clauses, obligations, and provisions therein contained shall subsist and continue in full force and effect, any law or practice to the contrary notwithstanding, and both parties consent to the registration hereof in the books of Council and Session or other Judges' books competent therein to remain for preservation, and if needful, that letters or warrant of horning on six days' charge and all other legal execution necessary may pass upon or be inserted in a decree to be interponed hereto in form as effeirs, and thereto they constitute *George Monro* and *John Dick* Esquires, advocates, their procurators."

The contract of marriage was "signed, sealed, and delivered in duplicate" by the parties as above mentioned, and at *Edinburgh*, on the 19th day of February, 1857, in the presence of the Lords of Council and Session, compeared *George Monroe* and *John Dick*, Esqs., and designed and gave in the contract, desiring the same might be registered in their Lordships' books conform to law, which desire

the said Lords found reasonable and ordered the same to be done accordingly.

On the 13th of April, 1859, Sir *H. O. R. Chamberlain* executed a disentailing assurance whereby the estate tail vested in him in the messuage in the *Hackney Road* was converted into a base fee, and whereby the estate tail or *quasi* estate tail vested in him in the sum of £11,001 2*s.* 6*d.* Consols was also converted into a base fee or *quasi* base fee; and whereby the fees into which the properties were so converted were (subject to the life estate mentioned, and the annuity) vested in the said trustees, their heirs, executors, administrators, and assigns, according to the nature of the premises.

On the 18th of August, 1868, the tenant for life having died, Sir *H. O. R. Chamberlain* executed a further disentailing assurance whereby the properties became converted into absolute estates.

The five Plaintiffs were the only issue of the marriage.

By a deed of nomination, dated the 2nd of December, 1867, Sir *H. O. R. Chamberlain*, in order to provide for the guardianship of his children after his death, appointed the Defendant *James R. Napier* and four others (two of whom were also Defendants) the five surviving trustees, and his sister, and the acceptors and survivors of them (the major number accepting, surviving, and acting and resident in *Great Britain* for the time being always a quorum), to be tutors and curators during their respective pupilarities and minorities to his children, three sons and two daughters.

Sir *H. O. R. Chamberlain* died on the 30th of December, 1870, intestate and without having concurred with his wife in any exercise of the joint power of appointment given to them by the contract.

Two of the trustees having died or ceased to act, by a deed of assumption, dated the 10th of July, 1871, and duly registered in *Edinburgh*, the three Defendants, being then the sole accepting surviving and acting trustees under the contract (two of whom were residing in *Scotland* and the other in *Ireland*), in virtue of the powers conferred upon them partly by the contract and partly by the Act 24 & 25 Vict. c. 84, assumed the Defendants *George James Wilson* and four others (three of whom resided in *Scotland* and one in *England*) as trustees of the trust estate comprised in

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the said contract, and disposed and conveyed to the persons named (the eight Defendants) and the survivors of them, and the heirs of the last survivor, as trustees for the purposes of the contract, a majority being always a quorum, and to the assignees of the said trustees, the whole trust estates heritable and moveable, real and personal, of every description or wherever situate then vested in them.

By a deed poll under her hand and seal Lady *Chamberlain*, on the 14th of March, 1871, in exercise of the power limited to her by the contract of marriage, appointed that immediately after her decease the messuage situate in the *Hackney Road*, and the sum of consols (reduced to the sum of £10834 10*s.* 10*d.*), and the securities or heritages in or upon which the same should be invested, should, in case Sir *Henry H. E. Chamberlain* (her eldest son) should live to attain the age of twenty-one years, but not otherwise, be and enure, and that the trustees of the contract of marriage or the survivors should stand seised and possessed of the same upon trust for him, his heirs, executors, administrators, and assigns absolutely.

There was a power reserved enabling Lady *Chamberlain* to revoke the trusts of that deed.

Lady *Chamberlain* after her husband's death resided in *England*, and died on the 13th of July, 1871, intestate, without having revoked the trusts declared by the deed poll, and without having further exercised any of the powers of appointment reserved to her by the said contract of marriage.

Difficulties having arisen in the execution of the trusts of the contract, a bill was filed for the purposes above mentioned, and a decree was made on the 1st of August, 1871, by which certain inquiries were ordered to be made as to the children of the marriage and as to the funds subject to the trusts of the contract.

The Chief Clerk, on the 6th of March, 1872, certified the facts, amongst others, that the eldest son was born in November, 1857; that the messuage situate in the *Hackney Road* still remained unsold and was let at £84 a year, and that the tenant had paid £750 premium, which was invested in the names of the trustees in the purchase of £760 2*s.* 2*d.* Consols; also that Sir *H. O. R. Chamberlain* was never domiciled in *Scotland*, but served in the *Lanarkshire* militia while staying temporarily in *Scotland*, and that the

contract was executed with the full knowledge and intention that immediately or very soon after their marriage they should leave *Scotland* and take up their permanent abode in *England;* that they did not ever return to *Scotland;* that after the death of Sir *H. O. R. Chamberlain* his widow continued to reside in *England,* and at the time of executing the deed of appointment in March, 1871, she was living at *Brighton,* and that she continued to reside there and in *London* up to the time of her death in July, 1871.

This was a petition presented by the eldest son for the purpose of obtaining an order that the trustees should execute the trusts of the deed of March, 1871, by vesting the messuage, and the consols, including the £760 2*s.* 2*d.*, in him, it having been alleged on the part of the four younger children that according to the law of *Scotland* the appointment in his favour was invalid; but the Petitioner alleged that he was advised, and he submitted, that the marriage contract, so far, at all events, as the same related to the properties of his father comprised therein, and the deed of appointment, ought to be construed, and the rights and interests of all parties in the same properties be determined, according to the law of *England;* and that he became on attaining the age of twenty-one absolutely entitled to the messuage and consols therein mentioned, and to the sum of consols representing the premium.

W. Pearson, Q.C., and *E. Ward,* for the Petitioner, Sir *H. Chamberlain:*—

The contract of marriage or deed of settlement, duplex in its nature, as it shews clearly that the properties comprised in it were to be kept distinct, the trusts being, as to one property, in English form, and, as to the other, in Scotch, should, so far as Sir *H. O. R. Chamberlain's* property is concerned, be construed by the law of this country. The real estate of the husband situate in *England* comes under the *lex loci,* and the direction to convert it into personalty cannot, as to that estate, affect the construction of the contract. If the contract should be treated as comprising personal estate only, still the *lex loci contractus* or *celebrationis* does not determine, necessarily, the construction of it, the intention of the parties being that which must be sought for, and the

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lex loci can be resorted to only where circumstances indicating intention are absent: *Lloyd* v. *Guibert* (1).

Parties to a deed made in one country may contract that the provisions of it shall be construed according to the law of another country: *Este* v. *Smyth* (2); *Van Grutten* v. *Digby* (3). The deed in the case of *Duncan* v. *Cannon* (4) was in Scotch form, and it was not disputed that it could be evidence of intention that it should be construed by the law of *Scotland*. The circumstance that the contract is to be carried out in a particular country is also evidence of intention that the contract is to be construed according to the law of that country: *Brook* v. *Brook* (5). *In re Cigala's Settlement Trusts* (6) may be cited against this proposition, but there the question was one of payment of succession duty, and the case therefore has no application. Cases that are applicable are *Anstruther* v. *Adair* (7), *Colliss* v. *Hector* (8), and *Cohen* v. *South Eastern Railway Company* (9). The intention of the parties to this contract of marriage was, that, as regards the husband's property, the provisions of the contract should be governed by the law of *England*.

Then as to the power to appoint the husband's property; it is submitted that it is an exclusive power, and that the appointment made by Lady *Chamberlain* is valid: *In re Veale's Trusts* (10). The word "such," unless a contrary intention appear, authorizes exclusion: *Farwell* on Powers (11); *Swift* v. *Gregson* (12).

[*Spring* v. *Biles* (13), *Turner* v. *Bryan* (14), *Re David's Trusts* (15), and *Kemp* v. *Kemp* (16), were also referred to.]

Crossley, Q.C., and *Alexander Young*, for three of the Respondents—the infant children of the marriage—after referring to the facts mentioned in the above statement, said:—

The Court is asked to take away from the Respondents the

(1) Law Rep. 1 Q. B. 115, 122, 123.
(2) 18 Beav. 112.
(3) 31 Beav. 561.
(4) 18 Beav. 128; 1 D. M. & G. 78.
(5) 9 H. L. C. 193.
(6) 7 Ch. D. 351.
(7) 2 My. & K. 513.
(8) Law Rep. 19 Eq. 334.
(9) 2 Ex. D. 253.
(10) 4 Ch. D. 61; 5 Ch. D. 622.
(11) Page 294.
(12) 1 T. R. 432.
(13) Ibid. 435, n.
(14) 31 Beav. 303.
(15) Joh. 495.
(16) 5 Ves. 849.

(4) Sc 18 Jur 736. 1 Jur NS 291

whole of their property. The contract of marriage is, according to the Scotch authorities, a Scotch deed, and reference will be made to both English and Scotch cases as to the true construction of it. The parties resided and married in *Scotland*, the lady being a Scotchwoman with a Scotch domicile. Their descriptions were Scotch, and they, by their desire to have registration in the Courts in *Edinburgh*, shewed that they elected that it should be considered a Scotch deed. The majority of the six trustees were Scotchmen residing in *Scotland*, and a quorum were entitled to act alone.

The recitals of the husband's property, and then of the wife's shew that there was no intention to make two separate contracts. The contracting parties agreed with each other that they would accept each other as lawful spouses, and promised to solemnize their marriage with all convenient speed. They did not contract with trustees. The husband's real estate in *England* was directed to be sold, and the moneys handed over to the Scotch trustees for investment in heritable or personal Scotch securities, and any investment out of *Scotland* required the consent of the wife. If the sale did not take place the income was to be applied as if it had. The last solemn act of the husband was to appoint Scotch guardians of his children. There was a complete denuding of the husband's property as English property. Any question of construction of the deed was entirely a matter for the Scotch Courts. The Scotch wife was entitled to her *jus relictæ*, but in this case given up in consideration of the contract. Still looking at it as an English clause, there has been no release of it by her to any person—no release which could be enforced against her in an English Court. If the Court construed this portion of the deed which affected her legal claims as being English, it would strike out some of the words of the deed; but construed as a Scotch deed, all the language of it could be considered together. If treated as a Scotch contract it could be enforced, but if treated as an English contract it could not be. There was no provision that a separate account of the trust funds should be kept. All the circumstances, both as regarded the original contract and the subsequent deeds, the frame of them, their scope, character, and phraseology, shew that there was an

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intention on the part of the husband that his property should not be dealt with by the English Courts. So much as regards the facts of the case. Then as to the question of law: The rule which is laid down so clearly is that a foreign contract should be construed in accordance with the law of the country where it is made: *Chitty* on Contracts (1); *Story's* Conflict of Laws (2). The exceptions to the rule are in the cases mentioned in *Lloyd* v. *Guibert* (3), where the contract is to be performed somewhere else, or the property is in another country, and cannot be moved. The parties may contract that the deed shall be construed in accordance with a law other than the *lex loci*, but such contract must be, and that is not the case here, so expressed.

The decision in *In re Cigala's Settlement Trusts* (4) was that the parties must go to a foreign country to commence proceedings where the property is vested in foreign trustees; therefore the contract should be construed in accordance with the law of that country. The property in this contract of marriage should be administered in *Scotland*, where the majority of the trustees resided, and there being no jurisdiction here to order service of the proceedings upon them in *Scotland*: *Cresswell* v. *Parker* (5). The opinion there expressed was confirmed in the case of *Corbett* v. *Waddell* (6), where the husband had an English domicile, the contract was executed in *Scotland*, and was in Scotch form, and there were Scotch trustees. That case may also be referred to upon the question of the wife giving up her right to property. The mere fact of there being English phraseology in the deed is immaterial in the circumstances mentioned in that case.

The cases cited for the Petitioner as to whether the contract should be governed by English or Scotch law, are not of the same weight and authority as the cases submitted for the Respondents and decided by Courts of Appeal. In addition to those authorities the case of *Anstruther* v. *Adair* (7) may be noticed.

The other question is, whether the power of appointment is exclusive or non-exclusive if the contract be construed in accordance

(1) 10th Ed. p. 89.
(2) Sects. 199, 276, 278, 279.
(3) Law Rep. 1 Q. B. 115.
(4) 7 Ch. D. 351.
(5) 11 Ch. D. 601.
(6) 7 Court of Sess. Cas. 4th Series, p. 200.
(7) 2 My. & K. 513.

with English law, and it is submitted that it is the latter, and that the appointment by Lady *Chamberlain* is invalid. The cases shew a complete distinction between such a power over real and over personal estate, and this was all absolutely personal: *Spring* v. *Biles* (1); *Alexander* v. *Alexander* (2). The contract here shews that if there were more than one child, each should have a share of the property: *Jarman* on Wills (3). In *Swift* v. *Gregson* (4), if the property had been personal the decision would have been different: *Sugden* on Powers (5). The intention clearly was that the whole of the property should go amongst all the children—and it should be remembered that in Scotch law no child can be cut off from every part of his father's estate: *Bell's* Principles of the Law of *Scotland* (6). Certainly the wife's property was to go amongst all, and the Court ought to hold that the power in regard to both properties should receive the same construction, and that the petition was not well founded. As to the trustees, they have accepted the process of the Court, but the trustees have not shewn that the contract is to be construed by any other than Scotch law. A question may arise whether they will be safe from process in the Courts of *Scotland*. The children may go to *Scotland* and make a claim in those Courts. The Petitioner also asks for the payment of the £760 paid by the tenant as premium. In 1873 the messuage was let for twenty-one years at £84 a year and the payment of the premium, and the Petitioner attained his majority in 1878, and it is submitted that he cannot claim that sum as part of the messuage. It does not come, whether treated as capital or income, within the terms of the power of appointment.

As to the law which should govern the contract, they referred to the further cases of *Trevelyan* v. *Trevelyan* (7); *Novelli* v. *Rossi* (8); and also the statute 30 & 31 Vict. c. 97, s. 5, which deals with powers of investment.

Farwell, for the other Respondent—a child of the marriage

(1) 1 T. R. 435, n.
(2) 2 Ves. Sen. 640.
(3) Vol. i. p. 512.
(4) 1 T. R. 432.
(5) 8th Ed. pp. 445, 446.
(6) Page 1587.
(7) 11 Court of Sess. Cas. 3rd Series, p. 516.
(8) 2 B. & Ad. 757.

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who had attained the age of twenty-one years—adopted the same arguments.

Hastings, Q.C., and *Byrne*, for five of the trustees—a quorum, also submitted that this was a foreign contract, and that the law of *England* could not properly be applied to its construction.

HALL, V.C.:—

The first question to be dealt with is, what law ought to be applied in construing the trusts declared by this contract of marriage, so far as they affect the property of, and settled by, the husband.

The case, as it seems to me, is not covered by any case which has ever been before the Court, but the principles which should guide me are, I think, sufficiently clear. There are two properties: one settled by the husband and the other settled by the wife, the trusts of both being declared by the same deed; but the two properties are subject to different trusts.

Considering the authorities which have been brought to my notice, particularly that of *Lloyd* v. *Guibert* (1), it seems to me that the rule is that the law of the place where the contract was made is ordinarily to be adopted in construing it. I am not aware whether in the Courts of *Scotland* there has been any departure from this general rule in any case of a contract of marriage. In the case of *Corbett* v. *Waddell* (2), Lord *Shand* said: "It is equally true that a marriage settlement will be construed according to the law of the domicile of the husband or marriage domicile." If that be the law it would dispose of this case, as the domicile of the husband here was English. Passing that by, however, not relying on the law of domicile, but taking the rule to be that the law of the place where the contract was entered into should govern the construction of the contract, it appears that the rule is subject to qualification. Mr. Justice *Willes*, in the judgment delivered by him in *Lloyd* v. *Guibert*, after referring to the general rule that the law of the place where the parties contracted was *primâ facie* that which they intended to adopt, says "that such law ought therefore to prevail in the absence of circumstances

(1) Law Rep. 1 Q. B. 122. (2) 7 Court of Sess. Cas. 4th Series, p. 200.

indicating a different intention, as for instance, that the contract is to be entirely performed elsewhere, or that the subject-matter is immoveable property situate in another country, and so forth." It was said in argument for the Respondents that this case is not one of those referred to there, and therefore is not an exception to the general rule. In using the words "as for instance" the learned Judge only gave instances of circumstances "indicating a different intention." Now, are there or not, in this case, circumstances which indicate a different intention in regard to the husband's property? I hold that there are. I quite agree with what was said in argument, that the provisions of the contract generally are of a Scotch character, but, notwithstanding that, there are portions of the contract which are separable from the remainder of it, and seem to me to contain an English contract, which was meant by the parties to it to be construed by and to operate under English law. There are, I think, circumstances which, as regards the husband's property and its destination, stamp the contract as English; and I think there is no difficulty on principle or in law, in holding that, in a contract framed as this is, a certain portion of it is to be treated and construed as English, while in all other respects it must be dealt with as Scotch.

Looking at the contract as it affects the husband's property, I agree that the provisions for barring the entail, creating a base fee, and converting it into a fee absolute, and the giving of powers in reference thereto, may be treated as separate and distinct in themselves, and although comprised in the contract they must be taken to be only preparatory to the creation of beneficial interests. It is ordinary practice in this country to convey an estate by one deed and declare the trusts of it by another. When I look at the trusts declared of the proceeds of sale of the husband's property, I find that they are declared as of funds which may be transferred to and come into the hands of the trustees of the settlement, who may be persons either named in the settlement or assumed under the power given for that purpose, and they are to be held in trust for the intended husband during his life, and after his decease for the intended wife, if then living during her life, and after the decease of the survivor "for such child or children of the said intended marriage, and if more than

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one, in such shares" . . . as the husband and wife, or the survivor, should appoint. Without adverting to the question of this being or not an exclusive power, I say it is an English common form of trust for children. In default of appointment the trust is for the children of the marriage, sons at twenty-one and daughters at that age or marriage with the consent of guardians, "with the usual powers for advancement, maintenance, and accumulation according to the law of *England*." The adoption of an English form of trusts ordinarily found in English settlements, and of powers according to the law of *England*, are circumstances favourable to the view that the settlement should, as regards the husband's property, be construed as being an English settlement.

The trusts in default of children attaining twenty-one or marrying, and of appointment by the husband or wife, are for the husband, "his executors, administrators, and assigns," which is an English trust.

Then comes the settlement of the wife's property, and in contrasting the form of the trusts declared of it with the former trusts I find some great differences. The trusts of the wife's property are declared in Scotch form: they are "for behoof of" her "in life rent," and after her death "for behoof of" the husband if he should survive, "also in life rent" . . . [His Lordship read and commented upon the following portions of the clauses, pointing out that they were in many respects peculiarly Scotch, and continued:—] There seems to be this difference between Scotch and English trusts in settlements—that in the Scotch, in framing the trusts for children, they are not provided for unless they survive the time when they are to take. The trust over is in default of children "surviving the wife," and I suppose that in *Scotland* the Courts give effect to those words. The English form of vesting the shares of children is to make the attainment of the age of twenty-one or marriage (as to daughters) the decisive test as to whether the children shall take or not, and accordingly the trusts over in this contract of marriage are accurately framed so as to make them fit in with that; thus there is a marked distinction between the two sets of trusts, the ultimate trusts of the two properties being framed in accordance, as to one, with English law, and, as to the other, with Scotch

law. There are certain trusts not expanded, but declared in reference to English law, viz., the trusts "for advancement, maintenance, and accumulation." It is, in my opinion, as plain as possible that the contracting parties did in substance, though not in direct terms, say that the trusts, so far as the husband's property is concerned, should be considered as being in a settlement to be construed by the law of *England*. That is quite consistent with the general rule laid down in the judgment delivered by Mr. Justice *Willes* in *Lloyd* v. *Guibert* (1), and no authority has been referred to which is contrary to that rule. Moreover, in the Scotch case of *Corbett* v. *Waddell* (2), already referred to, there is a great deal which is confirmatory of it, for Lord *Shand*, after that part of his judgment which I have quoted in regard to the law of domicile, said: "But this last rule is subject to an important exception: in the first place it is not disputed that the parties may make it a part of their contract that their rights shall be subject to the law of another domicile, and if this be clearly expressed, the law of the country to which they so subject their rights will have effect. The same result will be brought about if from the terms and nature of the contract it is a fair inference that this was the intention; and, looking to the nature and terms of this contract, where the trustees named were Scotch and the administration was to be in *Scotland* and subject to the jurisdiction of the Courts of this country, and where throughout there is so much requiring construction of legal phraseology peculiar to this country, I think it must be inferred that it was the intention and contract of the parties that their rights should be regulated by the law of *Scotland*."

So here I infer and collect from the trusts of the contract that there was an intention that there should be a difference between them; that one set should be construed as being English and the other as being Scotch. It was not intended that they should be fused together, so as that the one set should be construed like the other. The argument for the Respondents was that the English construction must give way to the Scotch, and the whole trusts receive a Scotch construction, but I draw a different conclusion from the trusts, seeing that the two sets are not framed in the

(1) Law Rep. 1 Q. B. 122. (2) 7 Court of Sess. Cas. 4th Series, p. 200.

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same way. They are different, and they were meant to be different; and the contract was intentionally so framed in *Scotland;* therefore I hold that the trusts relating to the husband's property must be construed in accordance with English law; and I cannot but believe that if this contract of marriage were before the Courts in *Scotland,* the Judges there would so hold, and say that as to these trusts they did not know how to administer them; and they would probably apply to this Court for advice and instruction.

Then as to the question whether the power of appointment is an exclusive one or not. It is not necessary for me to go through all the cases which have been referred to during the argument. I will do what the Master of the Rolls, in *In re Veale's Trusts* (1), said was the proper thing to do: try to find out the meaning of the words according to their ordinary use. Now the trust is "for such child or children" of the marriage, "and if more than one in such shares and in such manner and form" as the husband and wife, or the survivor, should appoint, and not a trust for all and every the children and child, or for the children whom the donees of the power should appoint. Can there be a doubt as to the meaning of the language if considered independently of the authorities? Nobody is an object of the trust through the medium of the power, except he or she be a child appointed. It is not a trust for children with a superadded provision for distribution among those children. In that case the Court would have to give some effect to the mention of all the children at the commencement of the gift. Here the form is "for such child," in the singular, "or children," not "and children," as it was in the case of *Swift* v. *Gregson* (2), in which, although the words were "such child and children," the Court held that the power was exclusive. It was stated that the decision there had been questioned by Lord *St. Leonards.* If it has been it may be distinguished, because the conjunctive "and" was used, and it may be said that the donee of the power was not entitled to choose one child out of many. But there is that decision before me, and according to the ordinary and fair construction of the words, I consider that the case is in itself quite enough to lead

(1) 4 Ch. D. 61. (2) 1 T. R. 432

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me, and indeed to require me, to hold that this is an exclusive power. I may just refer to the cases as classified by Mr. *Farwell*, and say that the classification has been accepted and adopted by the Master of the Rolls, and that I am very willing to recognise and adopt it as well. I hold, therefore, that the power of appointment was well exercised by the appointment of Lady *Chamberlain* in giving the property of her late husband to one child; and that the £750 paid as premium must be treated as part of the capital, and goes in the same way as the messuage from which it was derived.

Solicitors: *Newman, Stretton, & Hilliard*; *Edward Byrne.*

V.-C. H. 1880 *July* 26; *Aug.* 7.

In re BARKER'S ESTATE.
HETHERINGTON *v.* LONGRIGG.

[1878 B. 322.]

Will—Codicil—Lapsed Share of Residue—Directed to fall into Residue—Intestacy.

A. B. by will gave real and personal estate to a trustee to sell and convert and out of the moneys to pay debts, and to divide the residue between five persons, named, equally. By a codicil *A. B.* bequeathed to the issue of *S. R.*, one of such persons, all the effects which by the will she had bequeathed to *S. R.*, who was stated to be dead, but if there should be no issue living at *A. B.*'s decease, or being such, if such effects should not be claimed by such issue within twelve months after her decease, then such effects should fall into and be considered as part of the residue of the personal estate. *S. R.* never had any issue:—

Held, that *S. R.*'s share of residue under the will was undisposed of.

Humble v. *Shore* (1) and *Lightfoot* v. *Burstall* (2) followed.

Crawshaw v. *Crawshaw* (3) distinguished.

FURTHER CONSIDERATION.

Ann Barker, who died in April, 1877, by her will made in September, 1875, after making some specific bequests, devised all her real estate (excepting a small estate which was included in a deed of settlement) and bequeathed all the residue of her personal

(1) 7 Hare, 247. (2) 1 H. & M. 546.
(3) 14 Ch. D. 817.

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estate to the Defendant, *William Longrigg* (who was appointed executor and trustee of the will), his heirs, executors, administrators, and assigns, upon trust to sell the real estate and to convert, and get in the residuary personal estate and to stand possessed of the moneys to arise from such sale and conversion upon trust thereout to pay the debts, funeral and testamentary expenses, and the legacies mentioned; and to divide the residue of the moneys to arise from such sale and conversion equally between *William Thompson*, *Mary Fleming*, *Sarah Nicholson*, *Sarah Rumney*, and *Mary Hetherington*. The testatrix directed that the trustee should invest the share of the residue of *Mary Hetherington* and pay her the income for her life for her separate use, and after her decease in trust, as to capital and income, for her child or children, if more than one, who should attain the age of twenty-one or marry.

By a codicil made in January, 1877, the testatrix bequeathed to the issue, equally, if more than one, of *Sarah Rumney* all the effects, by the will, bequeathed to *Sarah Rumney*, who was therein stated to be then dead, but if there should be no issue living at the testatrix's decease, or being such, if such effects should not be claimed by or on behalf of such issue within twelve calendar months after her decease, then such effects should fall into and be considered as part of the residue of the testatrix's personal estate.

The Plaintiffs were the children of *Mary Hetherington* (who died in September, 1878), and they, in June, 1878, commenced an action for the administration of the estate.

Sarah Rumney had died without issue, and a question arose between the residuary legatees and the heir-at-law and next of kin as to the share, by the will, bequeathed to *Sarah Rumney*, and, by the codicil, to her issue.

Hastings, Q.C., and *Colt*, for the Plaintiffs, submitted that there was not an intestacy, but if there were it was only as to one-fifth of the fifth share. This case differed from those which would be cited for the heir-at-law and next of kin. The testatrix never meant to die intestate. She intended that the share of *Sarah Rumney* should go to the other four legatees; that it should fall into the residue and be divided between them.

W. Pearson, Q.C., and *Brodrick*, for *William Thompson*, and *Gatey*, for the two other residuary legatees in the same interest.

They referred during the arguments to the cases of *Harris* v. *Davis* (1), *Evans* v. *Field* (2), and *Crawshaw* v. *Crawshaw* (3).

Pope, for the heir-at-law and next of kin, submitted that the whole of the one-fifth of the estate was undisposed of, and that the heir-at-law and next of kin were entitled to it respectively.

He referred to the cases of *Humble* v. *Shore* (4); *Lightfoot* v. *Burstall* (5); *In re Bevis' Trusts* (6); *Cheslyn* v. *Cresswell* (7).

Maclean appeared for the trustees.

Aug. 7. HALL, V.C.:—

In this judgment I treat the codicil as applicable to *Sarah Rumney's* share of residue under the will, and I am of opinion that it is undisposed of. I think that the case is governed by *Humble* v. *Shore*; *Lightfoot* v. *Burstall*, in which case Vice-Chancellor *Wood* distinguished *Evans* v. *Field*, the testatrix having, as was considered, expressly disposed of what might fall in; and by *In re Bevis' Trusts*, *Sykes* v. *Sykes* (8), and *Homfray* v. *Darby*, before the Master of the Rolls on the 11th of January, 1879, and affirmed on appeal on the 25th of November, 1879. The papers in that case I have been furnished with by Mr. *Karslake*. In it the trust was as to a sum of £7000, part of residue and a further aliquot share of residue, "in trust to sink into and form part of my residuary estate." The Master of the Rolls in that case said that he was bound by *Humble* v. *Shore* and *Lightfoot* v. *Burstall*, and his judgment and the judgment of the Court of Appeal followed those cases and the judgment in *Sykes* v. *Sykes*. In *Humble* v. *Shore*, in addition to the words occurring in this case, there were the words "and be disposed of accordingly," and in

(1) 1 Coll. 416.
(2) 8 L. J. (Ch.) 264.
(3) 14 Ch. D. 817.
(4) 7 Hare, 247; 1 H. & M. 550.
(5) 1 H. & M. 546.
(6) 20 W. R. 359.
(7) 3 Bro. P. C. (Toml.) 246; 2nd Ed. p. 123.
(8) Law Rep. 4 Eq. 200.

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Lightfoot v. *Burstall* (1) there were the additional words "and be held and applied accordingly," and those cases, therefore, were more favourable to the testamentary instrument operating on the share falling in than the words in the present case. The Master of the Rolls has had occasion to consider the cases in a recent case of *Crawshaw* v. *Crawshaw* (2), and his judgment I have seen. In that case the Master of the Rolls again said he was bound by the decisions in *Humble* v. *Shore* (3) and *Lightfoot* v. *Burstall*, but his judgment was against an intestacy: he, as I collect, finding special grounds in the will for not applying those cases, which I do not find here.

Solicitors: *Edmund Warriner*, agent for *C. G. Thomson & Wilson, Kendal; J. & E. Scott*, agents for *G. Gatey, Ambleside; Bell, Brodrick, & Gray*, agents for *Bleaymire & Shepherd, Penrith.*

(1) 1 H. & M. 546. (2) 14 Ch. D. 817.
(3) 7 Hare, 247.

CAVE *v.* CAVE.

[1879 C. 282.]

FRY, J.
1880
April 20, 23.

Constructive Notice—Equitable Priorities—Notice through Solicitor—Equitable Estates—Priority of Time.

The rule that notice of a trust through his solicitor is not imputed to a mortgagee where the solicitor is a party to a fraud, discussed.

Espin v. *Pemberton* (1) and *Rolland* v. *Hart* (2) considered.

A trustee (a solicitor) used trust funds in purchasing an estate which was conveyed to his brother, and afterwards acted as solicitor for his brother, the mortgagee, in raising money on the estate by legal and afterwards by equitable mortgages:—

Held, that the legal mortgagee had prority over the *cestuis que trust*, for that the fraud of the solicitor ran through the whole transaction, and prevented the imputation of notice:

Held, also, that the claim of the *cestuis que trust* was an equitable estate of the same quality as the estates of the equitable mortgagees, and had priority over them as being prior in time.

Phillips v. *Phillips* (3) considered.

THE Plaintiffs were the *cestuis que trust* under the settlement executed on the marriage of Mr. and Mrs. *Frederick Cave* on the 27th of January, 1863. On the 27th of November, 1867, the Defendant *Charles Cave* was appointed trustee of the settlement, and in the year 1871 he became the sole trustee.

The trust funds, which were at that time in his hands, consisted of £3600 advanced on mortgage and £276 consols. Out of these sums £1950 and £702 17*s.* 6*d.* were improperly invested in the purchase of certain lands at *Wandsworth* in the following manner:—

Charles Cave, the trustee, received the trust moneys which had been secured on mortgage in 1872, and paid it to an account in the *National and Provincial Bank* in the joint names of himself and his brother *Frederick Cave*. A cheque was drawn on this account in June, 1872, by the two in favour of *Frederick Cave*, and the money was laid out in the purchase of freehold land at *Wandsworth*. *Charles Cave* acted in the purchase as trustee of

(1) 3 De G. & J. 547. (2) Law Rep. 6 Ch. 678.
(3) 4 D. F. & J. 208.

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the settlement and also as solicitor of himself and of *Frederick Cave*, and the conveyance of the property was made to *Frederick Cave*, and the deeds relating to the property were held by *Charles Cave*, the trustee of the settlement.

In September, 1872, another cheque was drawn by *Charles Cave* and *Frederick Cave* on their banking account in favour of the Accountant-General of the Court of Chancery, and the proceeds were applied in purchasing other land at *Wandsworth*, and the conveyance of the land was prepared by *Charles Cave*, and was made to *Frederick Cave*.

The Defendant *Philip Chaplin*, on the 10th of February, 1873, advanced to *Frederick Cave* £4500 on a first mortgage of the land thus improperly purchased, which contained absolute covenants for title by *Frederick Cave*. *Charles Cave* acted as the solicitor of *Philip Chaplin* in relation to the said advance, and stated that the land belonged to one of his brothers, and the question arose whether *Philip Chaplin* had or had not constructive notice through *Charles Cave* who so acted as his solicitor, that the said lands had been purchased with and represented the trust moneys subject to the trusts of the settlement.

In October, 1873, the Defendant *John White* advanced £1800 on the same property without notice of the first mortgage, and on this occasion *Charles Cave* wrote a letter to Mr. *White* stating that *Frederick Cave* had lately bought the freehold house and land at *Wandsworth*, which had compelled him to withdraw some of his capital from his business.

The other Defendants, *W. Nichols* and *Haslam, Appleton, & Company*, also advanced money on subsequent mortgages of the same land to *Frederick Cave*, and in 1874 *Philip Chaplin*, the first mortgagee, made further advances on the same security.

In 1875 *Frederick Cave*, who had been in business with *George Cave*, dissolved partnership upon the terms of his paying to *George Cave* £5000, £2250 of which was secured by a mortgage of the same lands. In this case, however, Mr. Justice *Fry* was of opinion that *George Cave* had actual notice of the breach of trust.

In April, 1879, *Frederick Cave* became a bankrupt, and the Plaintiffs claimed to prove against his estate for these breaches of

trust, and they also claimed priority over all the liens claimed on the land by the several Defendants, on the ground that when they took their charges they had constructive notice of the breach of trust.

The Defendants denied that they had notice, and relied especially on the fraud of *Charles Cave* as a circumstance raising a presumption that he would not have communicated the circumstances of his fraud to the mortgagees.

Cookson, Q.C., and *Everitt*, for the Plaintiffs:—

Chaplin, the first mortgagee, had notice through his solicitor, *Charles Cave*, that the mortgaged property was trust property. The cases of *Kennedy* v. *Green* (1), *In re European Bank* (2), and *Waldy* v. *Gray* (3) do not apply to this case. There the solicitor had not merely neglected his duty as solicitor in not making known what he knew to his client, but had been guilty of an independent fraudulent act: here there was mere neglect of duty, and notice to the solicitor will be notice to his client: *Atterbury* v. *Wallis* (4); *Rolland* v. *Hart* (5); *Bradley* v. *Riches* (6).

And as to *White* and the subsequent mortgagees, who have only equitable mortgages, their equities must be postponed to the equity of the Plaintiffs, which is prior in point of time: *Newton* v. *Newton* (7); *Stackhouse* v. *Countess of Jersey* (8); *Phillips* v. *Phillips* (9); *Baillie* v. *M'Kewan* (10); *Joyce* v. *De Moleyns* (11); *Attorney-General* v. *Wilkins* (12).

Fischer, Q.C., and *W. H. Cochran*, for the first mortgagee, *Philip Chaplin*:—

Philip Chaplin is entitled to priority, having the legal estate, because the solicitor was guilty of negligence amounting to fraud upon both clients, which raises a legal presumption that the trust was not communicated by him. *Kennedy* v. *Green* was

(1) 3 My. & K. 699.
(2) Law Rep. 5 Ch. 358.
(3) Ibid. 20 Eq. 238.
(4) 8 D. M. & G. 454.
(5) Law Rep. 6 Ch. 678.
(6) 9 Ch. D. 189.
(7) Law Rep. 6 Eq. 135; Ibid. 4 Ch. 143.
(8) 1 J. & H. 721.
(9) 4 D. F. & J. 208.
(10) 35 Beav. 177.
(11) 2 J. & Lat. 374.
(12) 17 Beav. 285.

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approved in *Hewitt* v. *Loosemore* (1); *Atterbury* v. *Wallis* (2); *In re European Bank* (3).

Philip Chaplin was not guilty of any negligence, and ought not to be deprived of his priority: *Espin* v. *Pemberton* (4); *Thompson* v. *Cartwright* (5); *Waldy* v. *Gray* (6). *Hayne's* pamphlet on the Defence of Purchase for Value without Notice (7), was also referred to.

Warmington, for a subsequent mortgagee:—

The Plaintiff might perhaps have followed the trust fund itself against the subsequent incumbrancers, but cannot enforce his equity against property which has been purchased with the trust fund and then mortgaged: *Lewin* on Trusts (8). Here the mortgagees have an estate; the Plaintiff has only an equity without an estate and must be postponed: *Phillips* v. *Phillips* (9). It may be that where the *cestui que trust* is following the trust fund itself the plea by an equitable mortgagee of purchase for value without notice is no defence, but where the trust fund has been converted, as here, into other property, it is a good defence. *Newton* v. *Newton* (10), *Stackhouse* v. *Countess of Jersey* (11), and the other cases cited for the Plaintiff, were cases where the trust property itself was being followed: *Price* v. *Blakemore* (12); *Scales* v. *Baker* (13); *Hopper* v. *Conyers* (14).

North, Q.C., and *McSwinney*, for *George Cave*, supported *Warmington's* arguments, and cited *Lewin* on Trusts (15); *Campbell* v. *Mullett* (16); *Pilcher* v. *Rawlins* (17); *Hunter* v. *Walters* (18).

Romer, for other subsequent mortgagees, used similar arguments.

Etherington, for the trustees in bankruptcy of *Frederick Cave*.

(1) 9 Hare, 449.
(2) 8 D. M. & G. 454.
(3) Law Rep. 5 Ch. 358.
(4) 3 De G. & J. 547.
(5) 33 Beav. 178; 2 D. J. & S. 10.
(6) Law Rep. 20 Eq. 238.
(7) Page 65.
(8) 6th Ed. p. 699.
(9) 4 D. F. & J. 208.
(10) Law Rep. 6 Eq. 135; Ibid. 4 Ch. 143.
(11) 1 J. & H. 721.
(12) 6 Beav. 507.
(13) 28 Beav. 91.
(14) Law Rep. 2 Eq. 549.
(15) 6th Ed. p. 593.
(16) 2 Sw. 551.
(17) Law Rep. 7 Ch. 259, 273.
(18) Law Rep. 7 Ch. 75.

Cookson, in reply.

FRY, J., stated the facts, and continued :—

The question before me concerns the priority of the liens or charges claimed against the *Wandsworth* property. The Plaintiff's right to a charge against the original purchaser of the property, *Frederick Cave*, is not and could not be in dispute. The question, however, arises between persons who claim subsequently to the original purchase by the trustee, or rather by *Frederick Cave*, who obtained the money from the trustee.

It appears that after the two conveyances were made to *Frederick Cave* in June and September, 1872, *Frederick Cave*, in February, 1873, mortgaged the property to the Defendant *Philip Chaplin* for the sum of £2500, and subsequent advances were made by *Chaplin* which bring the amount in all up to £5550. With regard to the last of those advances, the sum of £550, it was subsequent to Mr. *White's* advance, and it has not been contended that it can have priority over that. Between the Plaintiff and *Chaplin* the course of argument has been this: It has been proved that the same solicitor, Mr. *Charles Cave*, who was also surviving trustee, acted in the matter of *Chaplin's* mortgage both for *Chaplin* and for the mortgagor, *Frederick Cave*. The Plaintiffs say, "You employed the same solicitor as the mortgagor, and you therefore had knowledge of the circumstances affecting *Frederick Cave's* title against us." To that *Chaplin* replies that *Charles Cave* was a party to a fraud, and that the circumstances are such as to render it impossible to conceive that the facts which were known to *Charles Cave* were communicated by him to *Chaplin*.

The question I have to determine is whether the Defendant *Chaplin* is right or wrong in that contention.

The doctrine applicable to the question has been commonly called that of constructive notice. Lord *Chelmsford*, in the case of *Espin* v. *Pemberton* (1), considered that to be an inaccurate description, and thought that the expression "imputed notice" was the correct one. It is not very material to consider which of the two terms is the more accurate, because there is undoubtedly an exception to the construction or imputation of notice from the agent to the

(1) 3 De G. & J. 547.

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principal, that exception arising in the case of such conduct by the agent as raises a conclusive presumption that he would not communicate the fact in controversy. This exception has been put in two ways. In the very well-known case of *Rolland* v. *Hart* (1), Lord *Hatherley* put it substantially in this way, that you must look at the circumstances of the case, and inquire whether the Court can see that the solicitor intended a fraud, which would require the suppression of the knowledge of the incumbrance from the person upon whom he was committing the fraud. In *Thompson* v. *Cartwright* (2), the late Master of the Rolls put it rather differently, and it would appear that in his view you must inquire whether there are such circumstances in the case, independently of the fact under inquiry, as to raise an inevitable conclusion that the notice had not been communicated. In the one view notice is not imputed, because the circumstances are such as not to raise the conclusion of law, which does ordinarily arise from the mere existence of notice to the agent; in the other view—that of Lord *Chelmsford* and Lord *Hatherley*—the act done by the agent is such as cannot be said to be done by him in his character of agent, but is done by him in the character of a party to an independent fraud on his principal, and that is not to be imputed to the principal as an act done by his agent.

Those being the principles applicable to the decision of this case, I must ask myself what are the circumstances. In the first place the trust moneys had, contrary to the terms of the trust, been invested in the purchase of property at *Wandsworth*, and that property had been by a gross breach of trust conveyed entirely into the name of *Frederick Cave*, the husband. That might have been a mere irregularity, but it might have been, and I think in this case it was, something much worse. I find that in October *Frederick* and *Charles Cave* proceeded to negotiate a loan from Mr. *White* for £700, and on that occasion *Charles Cave*, the solicitor, addressed a letter to *White*, in which, among other things, he said, "My brother *Frederick* has lately bought a freehold house and land at *Southfields*, *Wandsworth*, close to *Wimbledon*, for £1950; this has compelled him to withdraw some of his capital from the *Richmond* business." Those

(1) Law Rep. 6 Ch. 678. (2) 33 Beav. 178.

statements are lamentably deficient in accuracy; the intention was to suggest that *Frederick* was the absolute owner of the house. In my view, in equity he was only owner subject to a lien for the trust money invested in it. It is not true that he had been compelled to withdraw any capital from the *Richmond* business to purchase the house, for the whole of the money appears to have been derived from the trust fund. Further than that, when the negotiations began with *Chaplin* for the mortgage that was ultimately completed, *Charles Cave* stated that the house and property belonged to one of his brothers, which was a statement again intended to induce the belief that the brother was so far the absolute owner as that he had a right to deal with the property absolutely. Looking at these transactions, I come to the conclusion that there was a design on the part of *Frederick* and *Charles Cave* to commit a fraud by obtaining money under false pretences, and that the conveyance of the land into *Frederick Cave's* name was a step towards that. Having come to that conclusion it is impossible for me to suppose that the loan obtained from *Chaplin* was not a further step in the same common enterprise, and it seems to me impossible to suppose that *Charles Cave* would have communicated the real facts to *Chaplin*.

But the matter does not rest there, for when the transaction is completed by means of the legal mortgage to *Chaplin*, that document contains absolute covenants for title on the part of *Frederick Cave*. *Frederick Cave* thereby covenants with *Chaplin* "that he *Frederick Cave* now hath power to grant all the said premises hereinbefore expressed to be hereby granted to the use of the said *Philip Chaplin*, his heirs and assigns, and also that if default shall be made in payment of the said sum of £2500, or any sum which may afterwards be advanced or lent or become owing, or the interest for the same or any part thereof respectively, on the days on which the same is covenanted to be paid, it shall be lawful for the said *Philip Chaplin*, his heirs and assigns, to enter into and upon all or any of the said premises, and the same thenceforth to hold and enjoy, and to receive the rents and profits thereof without any interruption or disturbance by the said *Frederick Cave* or any other person, and that free and discharged from or otherwise by the said *Frederick Cave*, his heirs, executors,

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or administrators, sufficiently indemnified against all estates, incumbrances, claims, and demands whatsoever." According to the judgment of the Master of the Rolls in *Thompson* v. *Cartwright* (1), to which I have been referred, I am bound to look at the terms of the mortgage in considering whether there was an intention on the part of the solicitors to commit a fraud, and, looking at it, the conclusion I had arrived at independently of them is strongly confirmed.

The conclusion I arrive at is, that *Chaplin* has sustained the burden cast upon him of proving that the circumstances are such as repel the construction or imputation to the principal of notice to the agent. Therefore I hold that Mr. *Chaplin's* mortgage has a priority over the Plaintiffs'.

The next question arises between the Plaintiffs and *White*, and also between all the other incumbrancers upon the fund. That question is of this nature: all these incumbrancers allege that they are purchasers for value without notice, and they plead that, being purchasers for value without notice, they have a sufficient and conclusive defence. That defence, as we all know, has been the subject of a great deal of decision, and it is by no means easy to harmonise the authorities and the opinions expressed upon the subject. Criticisms upon old cases lie many strata deep, and eminent Lord Chancellors have expressed diametrically opposite conclusions upon the same question. The case of *Phillips* v. *Phillips* (2) is the one which has been principally urged before me, and that, as being the decision of a Lord Chancellor, is binding upon me, notwithstanding the subsequent comments upon it of Lord *St. Leonards* in his writings. That case seems to me to have laid down this principle, that, as between equitable interests, the defence will not prevail where the circumstances are such as to require that this Court should determine the priorities between them. The classes of cases to which that defence will apply are other than that. Lord *Westbury* in the course of his judgment in that case said this (3): "I take it to be a clear proposition that every conveyance of an equitable interest is an innocent conveyance, that is to say, the grant of a person entitled merely in equity

(1) 33 Beav. 178; 2 D. J. & S. 10. (2) 4 D. F. & J. 208. & Jur. N.S. 1
(3) 4 D. F. & J. 215. & Jur. N.S. 145.

(11 C.P. Jur. N.S. 940, 1215.

passes only that which he is justly entitled to and no more. If, therefore, a person seised of an equitable interest (the legal estate being outstanding), makes an assurance by way of mortgage, or grants an annuity, and afterwards conveys the whole estate to a purchaser, he can grant to the purchaser that which he has, namely, the estate subject to the mortgage or annuity, and no more. The subsequent grantee takes only that which is left in the grantor. Hence grantees and incumbrancers claiming in equity take and are ranked according to the date of their securities, and the maxim applies, '*Qui prior est tempore potior est jure.*' The first grantee is *potior*—that is, *potentior*. He has a better and superior —because a prior—equity." His Lordship then proceeded to explain the different classes of cases in which that defence is available, and the one which has been relied upon as bringing the case of the Defendants within the decision of Lord *Westbury* is the third class, which is this, that (1) "where there are circumstances that give rise to an equity as distinguished from an equitable estate—as, for example, an equity to set aside a deed for fraud, or to correct it for mistake—and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the Court will not interfere."

Now the question I have to determine is this, is the right of the parties to follow this money into the land an equitable estate or interest, or is it an equity as distinguished from an equitable estate? The decision of Lord *Eldon* many years ago appears to me to be perfectly conclusive upon the law. I refer to the case of *Lewis* v. *Madocks* (2), where on further consideration directions had been given for an inquiry as to certain trust moneys which had gone into land, the wife claiming an interest in the land as against the heir; and Lord *Eldon* said this: "The claim of the wife is put in this way, that personal property bound by the trust or obligation, whatever it is called, of this bond is traced into the purchase of a real estate, which estate must therefore be hers; but I do not know any case in its circumstances sufficiently like this to authorize me to hold that doctrine. I am prepared to say that the personal estate bound by this obligation, and which has been laid out in this real estate, is personal property that may be

(1) 4 D. F. & J. 218. (2) 17 Ves. 48, 57.

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demanded out of the real estate; that the estate is chargeable with it; but it was not so purchased with it, that the estate should be decreed to belong not to the heir but to the wife." In other words, his Lordship held that the estate descended to the heir subject to the charge. That charge appears to me to be a charge in equity, or, in other words, an equitable estate or interest. Very similar was the question which Vice-Chancellor *Kindersley* had to determine in the case of *Rice* v. *Rice* (1). He had there to adjudicate between two equities, one arising from the right of an unpaid purchaser to come upon the land, and the other arising by contract creating an equitable mortgage. It is a very leading and instructive case, in which the Vice-Chancellor considered very fully the application of the maxim, "*Qui prior est tempore potior est jure*," and laid it down thus: "To lay down the rule with perfect accuracy, I think it should be stated in some such form as this. As between persons having only equitable interests, if their equities are in all other respects equal, priority of time gives the better equity, or, '*Qui prior est tempore potior est jure.*'" He then went on to consider and weigh the two equities set one against the other in that suit, and then he says: "Each of the parties in controversy has nothing but an equitable interest; the plaintiff's interest being a vendor's lien for unpaid purchase-money, and the defendant *Ede* having an equitable mortgage. Looking at these two species of equitable interests abstractedly and without reference to priority of time, or possession of the title deeds, or any other special circumstances, is there anything in their respective natures or qualities which would lead to the conclusion that in natural justice the one is better or more worthy or more entitled to protection than the other? Each of the two equitable interests arises out of the forbearance by the party of money due to him. There is, however, this difference between them, that the vendor's lien for unpaid purchase-money is a right created by a rule of equity without any special contract; the right of the equitable mortgagee is created by the special contract of the parties. I cannot say that in my opinion this constitutes any sufficient ground of preference, though, if it makes any difference at all, I should say it is rather in favour of

(1) 2 Drew. 73.

the equitable mortgagee, inasmuch as there is no *constat* of the right of the vendor to his lien for unpaid purchase-money until it has been declared by a decree of a Court of Equity, whereas there is a clear *constat* of the equitable mortgagee's title immediately on the contract being made. But I do not see in this any sufficient ground for holding that the equitable mortgagee has the better equity."

In my judgment, the right of a vendor for the unpaid purchase-money is an equitable lien, and the right of the *cestuis que trust*, whose trust money has been invested in the lands, is also an equitable lien. I do not think I can really distinguish this equity from such an equitable lien as the Vice-Chancellor held to be in that case an equitable estate or interest of the same description as the equity of an equitable mortgagee. Therefore I shall conclude that, within the case of *Phillips* v. *Phillips* (1), the interest of the Plaintiff in this case is an equitable interest, and not merely an equity like the equity to set aside a deed, and therefore it must take its priority according to the priority of date.

Solicitors: *Brook & Chapman; H. H. Hughes; Curtis & Betts; James Edell.*

NIVES *v.* NIVES.

[1879 N. 80.]

Vendor's Lien—Purchase-money payable by Instalments—Liberty to apply as to future Instalments.

In an action by a vendor whose purchase-money was to be paid by instalments, some of which were not yet due, for specific performance of his contract and a declaration of his lien, liberty was given to apply in respect of future instalments as they accrued due.

THIS was an action by the vendor of a business and the business premises, being No. 3, *Brownlow Street, Holborn,* to enforce specific performance of the contract for sale, and to obtain a declaration that he was entitled to a lien on the business and leasehold premises for the purchase-money.

(1) 4 D. F. & J. 208.

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The purchase-money was payable under the contract by instalments, at short dates, some of which, amounting to £298 17*s.*, were not yet due, and others, amounting to £200, were overdue.

North, Q.C., and *Russell Roberts*, for the Plaintiff:—

We claim a lien both for the £200 and for the remaining instalments of purchase-money: *Taylor* v. *Neville*, cited in *Buxton* v. *Lister* (1); *Matthew* v. *Bowler* (2).

Cookson, Q.C., and *Beddall*, for the principal Defendants, who were assignees of the contract to purchase:—

There is no jurisdiction to declare the lien of the vendor for future instalments: *Lloyd* v. *Dimmack* (3).

Fellows, for other Defendants.

FRY, J., made the following order:—

Declare the Plaintiff entitled to specific performance of the agreement, and to a lien on the leasehold interest of the Plaintiff for the entirety of the unpaid purchase-money and future instalments, and direct an account of the instalments already due, with liberty to apply in Chambers fourteen days after the date of the certificate for an order for payment; the Plaintiff to have liberty to apply in respect of future instalments as they accrue due.

Solicitor for Plaintiff: *R. Chapman.*
Solicitors for Defendants: *Ingram, Harrison, & Ingram.*

(1) 3 Atk. 384. (2) 6 Hare, 110.
(3) 7 Ch. D. 598.

In re MEAD.
AUSTIN *v.* MEAD.

[1879 M. 262.]

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Donatio Mortis Causâ—Banker's Deposit Note—Bill of Exchange.

A testator, who held a banker's deposit note for £2700, in his last illness, two days before his death, expressed a wish to give £500, part of the amount, to his wife. At his request a friend filled up a seven days' notice to the bank to withdraw the deposit, and the testator signed it. The friend then took the notice to the bank. The testator afterwards signed a form of cheque, which was on the back of the note, "Pay self or bearer £500." The note was then handed to the wife. The testator died before the expiration of the seven days' notice. The practice of the bank was, when a customer withdrew part of a sum which he had placed on deposit, to give him a fresh note for the balance :—

Held, that there had not been a valid *donatio mortis causâ* of the £500, inasmuch as the cheque for that amount was not payable till after the testator's death.

The testator also, shortly before his death, gave to his wife two bills of exchange, which were payable to himself or order. They did not fall due until after his death. They had not been indorsed by him :—

Held, that there had been a valid *donatio mortis causâ* of the bills.

Veal v. *Veal* (1) followed.

THIS action was brought by the executors of *Job Mead*, who died on the 25th of May, 1879, against his widow and his residuary legatees, for the purpose of obtaining the decision of the Court whether the testator had made a valid *donatio mortis causâ* to his widow.

The testator had in his possession two bills of exchange for £26 5*s.* each, payable to himself or his order. He had also a sum of £2700 standing to his credit with the *London and Westminster Bank*, upon a deposit account, for which he held a deposit note. The note contained a receipt by the bank for the £2700, and a statement that the note was not transferable, and that the money could only be repaid after seven days' notice of withdrawal had been given to the bank. On the back of the note was printed an ordinary form of banker's cheque, which the depositor would have to

(1) 27 Beav. 303.

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fill up and sign if he desired to withdraw the money or any part of it. Attached to the note was a form of notice of withdrawal, which the depositor would also, if he wished to withdraw the money, have to fill up and sign, and leave with the bank seven days before the day when he wanted the money. If part only of the money was withdrawn, the practice of the bank was to give a new deposit note for the balance. About a fortnight before the testator's death, he being then in his last illness, a friend named *John Anderson* went to see him. He had previously told *Anderson* that he had no hope of recovering. He asked his wife to bring the two bills of exchange, and said that he wanted to give the money to her. She produced them, and gave them to *Anderson*, and the testator asked *Anderson* to present the bills when they became due, and to get the money and to give it to his wife, saying, "I mean her to have it." The bills did not become due until after his death. They had not been indorsed by the testator.

On the 23rd of May, 1879, two days before his death, he sent for *Anderson* again. *Anderson* went, and found him in bed very ill. Mrs. *Mead* was present in the room. The testator asked her to bring the deposit note, and to give it to *Anderson*. He said to Mrs. *Mead*, "I will give you £700." She said £500 would be sufficient for her, and the testator said to *Anderson*, "Very well," and asked him to fill up the form of withdrawal. *Anderson* did so, and the testator then signed it. The same day *Anderson* took it to the bank, and asked whether it would also be necessary for *Mead* to sign the cheque on the back of the deposit note. He was told by the bank clerk that this would be necessary. He went back to the testator's house and told him. The testator expressed his surprise that he had forgotten this. *Anderson* at his request then filled up the cheque with the sum of £500, "Pay self or bearer £500," and the testator signed it. He asked *Anderson* to take the note away with him, but *Anderson* said he would rather Mrs. *Mead* kept it till it was required, and the testator assented to that, and Mrs. *Mead* accordingly kept it till after his death. At this interview the testator, when he first spoke of giving his wife £700, said that £1000 would be quite enough for each of his two grandchildren (whom he had by his will made his residuary legatees), but when he reduced the gift to his wife to £500 he said nothing about the

other £200. He also told *Anderson* that when the cheque for the £500 was presented for payment the bank would give another deposit note for the balance.

W. Joyce, for the Plaintiffs, submitted the question to the Court.

North, Q.C., and *T. C. Jarvis*, for the widow:—

As to the bills of exchange, *Veal* v. *Veal* (1) is an authority that a promissory note, payable to order, will pass by a *donatio mortis causâ*, though not indorsed by the donor. In that case Lord *Romilly*, M.R., followed *Rankin* v. *Weguelin*, a decision of Sir *John Leach* (2). *Duffield* v. *Elwes* (3) is a similar authority with reference to a gift of a bond. Some of the older cases are no doubt inconsistent, such as *Ward* v. *Turner* (4); *Tate* v. *Hilbert* (5).

As to the £500, it was held in *Bouts* v. *Ellis* (6) that a gift of a cheque on the donor's own bankers was a good *donatio mortis causâ*, though there, no doubt, the cheque had been paid before his death. In *Amis* v. *Witt* (7) and in *Moore* v. *Moore* (8) the delivery of a banker's deposit note was held to be a good *donatio mortis causâ* of the money due on the note. In *Bromley* v. *Brunton* (9) a cheque was given by the drawer and was presented by the donee without delay. The bankers refused to pay it because they doubted the signature. The next day the donor died, the cheque not having been paid. It was held that there was a complete gift *inter vivos* of the amount of the cheque. In *Hewitt* v. *Kaye* (10), a cheque given by the drawer was not presented till after his death, and it was held that there was not a good *donatio mortis causâ*. *Rolls* v. *Pearce* (11) and *Beak* v. *Beak* (12) are other authorities as to cheques.

[They referred also to *Byles* on Bills (13).]

H. Lacy Fraser, for the residuary legatees.

(1) 27 Beav. 303.
(2) Ibid. 309.
(3) 3 Bli. N. R. 498.
(4) 2 Ves. Sen. 431.
(5) 2 Ves. 111.
(6) 17 Beav. 121; 4 D. M. & G. 249.
(7) 33 Beav. 619.
(8) Law Rep. 18 Eq. 474.
(9) Ibid. 6 Eq. 275.
(10) Ibid. 198.
(11) 5 Ch. D. 730.
(12) Law Rep. 13 Eq. 489.
(13) 12th Ed. p. 175, *et seq.*

FRY, J.

1880

In re MEAD. AUSTIN *v.* MEAD.

FRY, J.:—

I propose at present to deal only with the question as to the £500, and to reserve the point as to the bills of exchange for further consideration. [His Lordship then referred to the facts and to the evidence of *Anderson*, and continued:—] The authorities stand in this way. A gift of a banker's deposit note, with the view of giving to the donee the whole sum secured by it, has been held to be a good *donatio mortis causâ*. A gift of a cheque upon a banker, the cheque not being payable during the donor's life, has been held to be not a good *donatio mortis causâ*. To which of these two classes of decisions does the present case belong? In my judgment it belongs to the latter class. The effect of the notice of withdrawal given by the testator to the bank on the 23rd of May was to set free a fund of £2700 upon the 30th of May, and upon that fund the testator drew a cheque for £500 which was not payable till that day, *i.e.*, after his death. Looking at the whole of the circumstances of the case, and at the practice of the bank, which was to give a fresh deposit note for the balance when a part of the money was withdrawn, it does not appear to me that the delivery of the note was made with the intention of giving either it or the money to the wife. The intention was to deliver the cheque, and, according to the authorities, that is not a good *donatio mortis causâ*. I wish to consider the other point further, for there appears to be a direct conflict of authority upon it.

June 29. FRY, J.:—

I have looked at the cases, and I am prepared to follow *Veal* v. *Veal* (1). I hold, therefore, that the two bills passed to the widow by way of *donatio mortis causâ*.

Solicitors for all parties: *T. Noton.*

(1) 27 Beav. 303.

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[1879 L. 160.]

Marriage Settlement—Rectification—Evidence—Fiduciary Relation—Onus of Proof—Parties—Representation of Class—15 & 16 *Vict. c.* 86, *s.* 51—*Rules of Court*, 1875, *Order* XVI., *rr.* 7, 13.

Rectification of a marriage settlement decreed at the instance of the wife after the death of the husband upon her uncorroborated parol testimony.

Upon the marriage of a widow with a retired solicitor, who had formerly acted as her solicitor, the whole of her property, amounting to more than £20,000, was vested in trustees, upon trust to pay the income to the wife for her life, and after her death to the husband for his life; and, as to the capital, upon trust, after the death of the wife, to pay one moiety thereof to the husband, his executors, administrators, or assigns, and to hold the other moiety upon such trusts as the wife should by deed or will appoint. By another deed, executed contemporaneously, the husband, in exercise of a power given to him by the will of his father, charged some estates of which he was tenant for life, with remainder to his issue in tail male, with the payment of an annuity of £100 to the wife for her life. The settlement was prepared by the husband himself the night before the marriage, and was brought by him to the wife for execution on the morning of the marriage day. She had no independent professional advice. After the husband's death she brought an action for the rectification of the settlement by omitting the trust of a moiety of the capital for the husband. The trustees and one of the next of kin of the husband were made Defendants. The Plaintiff deposed that her husband had told her that he wished every farthing of her property to be settled upon her, and that she said she was willing to allow him a life interest; that he said he would employ counsel; that the settlement did not carry out her intentions, and that she did not know what its provisions were until after the husband's death:—

Held, that it was the duty of the husband to have explained to the wife in the most unmistakable terms, and with due opportunity for deliberation, the provision in his favour, and that, as the settlement on the face of it was not such as the Court would have sanctioned in the absence of agreement, the burden of proof was on the representatives of the husband, and the Plaintiff was entitled to the rectification which she claimed:

Held, also, that the fact that the Plaintiff claimed to retain the benefit of the settlement made on her by the husband was no bar to the rectification.

Held, that it was not necessary that the other next of kin should be made parties to the action, but that the drawing up of the judgment must be suspended for fourteen days, and that notice of the judgment must be served on those of the next of kin who were not parties.

THIS action was brought by *Mary Seawell Lovesy*, a widow, to obtain the rectification of the settlement dated the 29th of No-

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vember, 1875, made upon her marriage on that day with *Richard Whitehorne Lovesy*. The Plaintiff had down to the 19th of October, 1875, been the wife of one *Richard John Cole*, who then died. He had been for some years a lunatic. *Lovesy* had for some time acted as her solicitor, and very soon after *Cole's* death she became engaged to be married to *Lovesy*. She was entitled to property amounting to more than £20,000, which was all included in the settlement. By the settlement the property was assigned to trustees, upon trust to pay the income of the trust funds to the wife during her life, for her separate use, and after her decease to pay the income to the husband for his life. And, as to the capital, to stand possessed thereof upon trust, after the death of the wife, as to one moiety to be paid to the husband, his executors, administrators, or assigns absolutely; and, as to the other moiety, upon such trusts as the wife should by deed or will appoint.

The rectification claimed was the omission of the trust of a moiety of the capital of the trust funds for the husband.

The Defendants were the trustees of the settlement, and *Conway Whitehorne Lovesy* and *Georgiana Eykyn*, two of the next of kin of the deceased husband. Mrs. *Eykyn* had died before the trial of the action.

It was stated that there were other persons next of kin of the husband. Those persons were not, however, made parties to the action.

By another deed, also executed on the 29th of November, 1875, *Lovesy*, purporting to exercise a power given to him by the will of his father, in consideration of the intended marriage, granted, charged, and appointed to the trustees of the settlement a charge upon certain hereditaments, of which he was tenant for life, with remainder to his issue in tail male, of £200 per annum, to be paid to the Plaintiff during her life, with power of distress on the said hereditaments in default of payment of the annuity. After *Lovesy's* death it was discovered that under his father's will he had power to appoint to his wife a yearly rent-charge of £100 per annum only. Since the death of *Lovesy* the Plaintiff had been in receipt of the rent-charge of £100.

The Defendant, *C. W. Lovesy*, by his statement of defence,

objected that the other next of kin of the deceased husband ought to have been made parties to the action.

The nature and effect of the evidence are stated in the judgment of the Court.

North, Q.C., and *W. S. Owen*, for the Plaintiff:—

It is objected by the Defendant *Lovesy* that the other next of kin ought to have been made parties. But they all have exactly similar interests, and one is sufficient to represent the class: *Commissioners of Sewers of the City of London* v. *Glasse* (1); *Commissioners of Sewers of the City of London* v. *Gellatly* (2); *Read* v. *Prest* (3); 15 & 16 Vict. c. 86, s. 51; Rules of Court, 1875, Order XVI., rules 7, 13; *Hunter* v. *Young* (4). At any rate the absence of the other next of kin cannot affect the Defendant who is a party; he will be bound by the judgment, whatever may be the case with those who are not parties. The Court can give judgment, and then suspend the drawing up of the judgment for a limited period, say fourteen days, and direct notice to be served on the other next of kin, so as to give them an opportunity of being heard in opposition to the judgment.

Crossley, Q.C., and *Jason Smith*, for the Defendant:—

The judgment would be worthless as against those of the next of kin who are not before the Court. One of a class, no doubt, may be appointed to represent the class, but the Court must make an order for the purpose, and the effect of the order when made is that the whole class is present before the Court. The object of this action is to divest an estate which has vested in the next of kin. The settlement must be set aside as a whole. The other next of kin may have evidence in their possession in support of the settlement. It has never been the practice to treat a class as bound by representation when it consists of so small a number of persons. In *Read* v. *Prest* the Court nominated a representative of the class. The Defendant *Lovesy* ought not to paythe whole of the costs, as he is interested in only a part of the property.

(1) Law Rep. 7 Ch. 456.
(2) 3 Ch. D. 610.
(3) 1 K. & J. 183.
(4) 4 Ex. D. 256.

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[DENMAN, J., referred to *Swallow* v. *Binns* (1).]

Caddick v. *Cook* (2) is an authority the other way.

Cookson, Q.C., and *Begg*, for the trustees of the settlement:—

The Defendant *Lovesy* has no interest except in his own distributive share of the fund; the question is really between the Plaintiff and the trustees, who must see that the fund is properly distributed. The course suggested by the Plaintiff's counsel will meet the difficulty.

DENMAN, J.:—

It appears to me that the Rules give me power to go on with the trial of the case, and that I can properly adopt the course which was suggested by Mr. *North* and assented to by Mr. *Cookson*. It is not suggested that there is any difference in the interests of the next of kin, or that the case will not be as well contested by the one who is before the Court as by any of the others. I must, therefore, hear the case, and afterwards take such a course as may be best for giving notice to the other next of kin.

North, Q.C., and *W. S. Owen*, for the Plaintiffs:—

The principles upon which the Court acts with regard to the settlement of a wife's property are shewn by *In re Best's Settlement Trusts* (3); *Cogan* v. *Duffield* (4). Those cases shew that the settlement in the present case is not a proper one in the absence of express stipulation. The husband undertook to prepare a settlement of the wife's property, and it was his duty to prepare a proper settlement, such a settlement as the Court would have sanctioned: *Corley* v. *Lord Stafford* (5); *Clark* v. *Girdwood* (6). It being shewn that the husband undertook this duty, and that the settlement is not a proper one, the burden is thrown upon those who support the settlement. The Court will act on the uncorroborated testimony of the wife: *Smith* v. *Iliffe* (7); *Hanley*

(1) 9 Hare, App. xlvii.
(2) 32 Beav. 70.
(3) Law Rep. 18 Eq. 686.
(4) 2 Ch. D. 44, 49.
(5) 1 De G. & J. 238.
(6) 7 Ch. D. 9.
(7) Law Rep. 20 Eq. 666.

v. *Pearson* (1); *Cook* v. *Fearn* (2); *Edwards* v. *Bingham* (3); *Cordeaux* v. *Fullerton* (4).

Crossley, Q.C., and *Jason Smith*, for the Defendant *C. W. Lovesy*:—

The Plaintiff is an interested party, and her evidence is not corroborated. The parties were both of mature age. No bargain was made as to any provision for children. The husband made a settlement of his own property on the wife, and this circumstance distinguishes the present case from all the cases which have been cited. The two deeds must be read as one. The Plaintiff is seeking to alter the part which is against her present interest, and to retain the benefit of that part which is in her favour, and that after the death of her husband. Her evidence comes to no more than this, that she cannot recollect. It is not shewn that the husband would have married her on any other terms.

It is contrary to the practice of the Court to reform a deed, unless on the ground of either mutual mistake or fraud: *Seton* on Decrees (5); *McCormack* v. *McCormack* (6); *Rooke* v. *Lord Kensington* (7).

[DENMAN, J.:—The Plaintiff in this case does not rely on any mutual mistake, but upon a violation by her husband of the agreement or understanding which was come to between her and him.]

Even if fraud is alleged the uncorroborated parol testimony of the Plaintiff is not enough: *Hill* v. *Wilson* (8). It is quite clear that the husband thought he was to have half the wife's property. There is no evidence of any fraud. There is no documentary evidence to shew any agreement at all as to a settlement. The right conclusion is that it was agreed that the husband should have half of the wife's property. The effect of the decision in *In re Best's Settlement Trusts* (9) was to give the whole of the wife's property to the husband. In *Cogan* v. *Duffield* (10) the question was whether marriage articles had been properly carried out by a

(1) 13 Ch. D. 545.
(2) 27 W. R. 212.
(3) 28 W. R. 89.
(4) Ibid. 320.
(5) 4th Ed. p. 1233.
(6) Ir. Rep. 11 Eq. 130.
(7) 2 K. & J. 753.
(8) Law Rep. 8 Ch. 888.
(9) Ibid. 18 Eq. 686.
(10) 2 Ch. D. 44.

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subsequent settlement. And the settlement was only of the wife's fortune; nothing had been contributed by the husband. In *Corley* v. *Lord Stafford* (1) the husband had agreed in writing to settle the wife's fortune. *Clark* v. *Girdwood* (2) was a case of gross fraud, and is no authority for the present case. In *Smith* v. *Iliffe* (3) the decree was really a consent one. It was a case of gift, not of contract. *Hanley* v. *Pearson* (4) was really uncontested. So were *Cook* v. *Fearn* (5) and *Edwards* v. *Bingham* (6). There is really no contested case in which the Court has acted on the uncorroborated evidence of a wife. The older cases shew that something besides parol evidence is required: *Legg* v. *Goldwire* (7), and the cases there cited: *Marquis of Breadalbane* v. *Marquis of Chandos* (8); *Earl of Bradford* v. *Earl of Romney* (9); *Alexander* v. *Crosbie* (10); *Bentley* v. *Mackay* (11); *Marquis of Townshend* v. *Stangroom* (12); *Mortimer* v. *Shortall* (13).

If the case is based on fraud it must be shewn that there was a breach of the duty which the husband undertook to discharge. What he undertook to do was to prepare a settlement and bring it to the wife for her to peruse, that she might see whether it carried out her intentions. This he did.

Cookson, Q.C., and *Begg*, for the trustees.

North, in reply:—

It was the husband's duty to see that the wife understood the provisions of the settlement before she executed it, and, inasmuch as he took an interest under it, his duty was a higher one than that of an ordinary solicitor: *Segrave* v. *Kirwan* (14); *Bulkley* v. *Wilford* (15); *Garrett* v. *Wilkinson* (16); *Gibson* v. *Jeyes* (17). The burden of proof is, therefore, on those who support the settlement. The husband did not settle any property of his own; he only exercised a power over property which belonged to others.

(1) 1 De G. & J. 238. 3 Jur. N.S. 1255
(2) 7 Ch. D. 9.
(3) Law Rep. 20 Eq. 666.
(4) 13 Ch. D. 545.
(5) 27 W. R. 212.
(6) 28 W. R. 89.
(7) White & Tudor, L. C. 5th Ed. vol. i. p. 17.
(8) 2 My. & Cr. 711.
(9) 30 Beav. 431. 8 Jur. N.S. 403
(10) Ll. & G. (temp. Sugden) 145.
(11) 31 Beav. 143.
(12) 6 Ves. 328.
(13) 2 D. & War. 363.
(14) Beat. 157.
(15) 2 Cl. & F. 102.
(16) 2 Dr. & Sm. 244.
(17) 6 Ves. 266.

Hill v. *Wilson* (1) has not been strictly followed. In *Sugden* v. *Lord St. Leonards* (2) the contents of a lost will were allowed to be proved by the evidence of a single interested witness. But here the document itself really confirms the Plaintiff's story: *Mortimer* v. *Shortall* (3); *M'Cormack* v. *M'Cormack* (4).

July 12. DENMAN, J., after stating the effect of the two deeds and the nature of the rectification sought, continued:—

It was proved by the Plaintiff that within a few days of the death of her first husband, *R. W. Lovesy* became engaged to be married to her, and that he said that he wished every farthing of her property to be settled on her, and, upon her saying that she was willing to allow him to have a life interest if he survived her, he said he would have counsel employed. Nothing more passed on the subject of settlements until the night of Sunday the 28th of November, the day before the marriage. *R. W. Lovesy* was at the apartments in which the Plaintiff was residing up to about seven or eight o'clock that evening. He then went away, and it was arranged that the Plaintiff should sit up until he returned with the settlements. It was proved that on the same night *A. W. Lovesy* took one *Cook* and one *Paynter*, who were law writers, to an hotel which he frequented, and there dictated to *Paynter* the terms of the settlement, which were written down by *Paynter* and handed to *Cook*, who ingrossed them at once, as the sheets written by *Paynter* were handed to him. The same thing was done with the other deed by which *Lovesy* appointed £200 a year to his intended wife. This appointment was in excess of the power vested in him, and it was in effect only available to the extent of £100 per annum, but in other respects the settlement of that amount is not impeached, and the Plaintiff claims the benefit of it. This was one of the objections raised to her claim, but I am of opinion that there is nothing in that circumstance to disentitle her to her action. It can make no difference in her right to have a rectification of the settlement of her own property that the settlement of her husband's property is unobjectionable,

(1) Law Rep. 8 Ch. 888.
(2) 1 P. D. 154.
(3) 2 D. & War. 363.
(4) Ir. Rep. 11 Eq. 130.

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and not objected to. The sole question is whether in the circumstances which occurred she has a right to the rectification which she seeks. The deeds having been completed, as I have mentioned, were taken to the Plaintiff's then residence at about five o'clock in the morning. The Plaintiff swore that she was then weary with sitting up. She would not swear that a portion of the settlement in question might not have been read to her, or even the whole of it. But she swore that she never until after *R. W. Lovesy's* death in 1877 knew that half her property had been settled on him; that she never intended it; that she thought he was not to have any interest beyond a life interest after her death; and that she would not have married him if she had known that a moiety was settled on him absolutely. *Lovesy* had not practised as a solicitor in other matters for some little time before Mr. *Cole's* death, but no other solicitor was employed by the Plaintiff in advising her about the marriage settlement. The settlement was signed by the Plaintiff on the morning of the wedding day, about ten o'clock, she having been called down to execute it while making her wedding toilet, but it was not then read over, nor did she ever read it until after the death of *Lovesy*. It remained in the possession of his former partners, who had done business for Mrs. *Lovesy* on former occasions before her engagement to *Lovesy*.

The deed is in many respects open to criticism as a very hastily prepared document, the word "*Lovesy*" being in one place written "*Loseby*," and the word "sterling" in one place being used after the word "consols" instead of the word "standing." It is hardly possible to imagine that *Lovesy* should have read over such a document intelligibly to the Plaintiff without discovering such mistakes as these, and correcting them. I think that the proper inference to be drawn from the facts is that the settlement was never explained to the Plaintiff at all, but that she signed it upon the faith that it was a proper settlement according to her wishes, and according to *Lovesy's* statement to her that he wished every farthing of her property to be settled on her, she understanding by that expression that he was only to have a life interest in the property after her death, and no interest in the capital.

It was contended for the Defendant *C. W. Lovesy*, one of the next of kin of *R. W. Lovesy*, that no rectification could be decreed,

for several reasons, all of which I think fail. First, on the ground that the Plaintiff ought not to be allowed to take the benefit of the settlement made by her husband, and to repudiate that made in his favour. With this I have already dealt. Secondly, that, in the absence of a common mistake by both parties, no rectification can be allowed. But Mr. *North* for the Plaintiff did not rely upon a common mistake, but upon the doctrine that where there is a fiduciary relation between the parties the deed cannot stand, and is therefore liable to rectification, at the option of the party claiming, by merely omitting the provision complained of, unless the person against whom a trust is established has performed his duty in explaining in the clearest manner the effect of the transaction to the person standing in the position of *cestui que trust*.

In the present case I think it quite clear that it was the duty of *Lovesy* to explain the provision of the deed which it is now sought to strike out, in the most unmistakable terms and with due opportunity for deliberation, to his intended wife, and I am convinced that he did nothing of the kind. The case is not put on the ground of fraud, but upon the ground of a departure from the clear duty of a person who had taken upon himself the position of adviser and conveyancer as *Lovesy* had done. The case is very similar in principle to that of *Clark* v. *Girdwood* (1), which appears to me a strong authority for the Plaintiff. It was also contended that the expression sworn to by the Plaintiff, that *Lovesy* said he wished every farthing of her money to be settled on herself, was quite consistent with what was actually provided in the settlement. I cannot myself think so. She swears that she did not so understand it, and I see no reason to disbelieve her. And, if the two things be in any sense reconcilable, I think it was peculiarly a case in which that by no means obvious interpretation of her wishes and of *Lovesy's* implied promise ought to have been explained to her in the clearest possible manner by a person in the position of *Lovesy*, especially if he left the explanation to stand over until five o'clock in the morning of the wedding-day, he being himself the intended husband, the only legal adviser, and the preparer of the deed.

(1) 7 Ch. D. 9.

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But the main contention of the Defendant was that the Plaintiff's evidence must be wholly rejected, because it was uncorroborated by other testimony. This might be a formidable objection if there were nothing but the oath of the Plaintiff, and no objection to the settlement, either on the face of it or by reason of the relation between the parties. But I agree with Mr. *North* that in the present case a state of things existed which throws the burden of proof upon those who set up the settlement as representatives of *R. W. Lovesy*. The settlement itself is not one which, in the absence of any agreement between the parties, would have been sanctioned by the Court. It was drawn with evident haste, and at the last moment, when it ought to have been prepared with care and deliberation. It is so inaccurate in parts as to negative proper care. The relation between the parties was one of peculiar delicacy, involving in a high degree the duty of fully explaining the particular provision in *Lovesy's* favour which it is now sought to reject. I can find no authority for saying that in such a case as this the party affected has no right to a rectification merely because she may be unable to call any evidence but her own to prove what actually took place. Here all the parties who could have given evidence as to what took place on the morning of the 29th of November are dead, and no laches is to be imputed to the Plaintiff for not making her present claim sooner, as she was not in possession of the settlement; nor did any occasion for a rectification arise, until she first became aware of its contents after *Lovesy's* death. That there is no absolute rule that in no case can there be a rectification of a settlement upon the uncorroborated testimony of an interested party, was, I think, clearly shewn by the cases cited by Mr. *North*. Indeed, so to hold would be to repeal more than one Act of Parliament. But, fully recognising the duty of extreme caution in acting upon the uncorroborated testimony of an interested party, I think that in the present case there is every reason for accepting it. The probabilities seem entirely in its favour from the evidence given as to the time and mode of preparation adopted by *Lovesy*, and from the evidence of the hotel-keeper as to the time at which *Lovesy* took the deed to the Plaintiff's house, tallying as these do exactly with her own account. So much is this so, that I doubt whether

the present case can be considered as one in which the Plaintiff is uncorroborated within the meaning of the cases in which the Court has refused to act upon uncorroborated testimony.

I am of opinion that the Plaintiff is entitled to the relief which she prays, and that I ought to decree rectification of the settlement by omitting the trust of a moiety of the capital for the husband. I think that the costs of all parties ought to come out of the estate.

I order the drawing up of the judgment to be suspended for fourteen days, and that notice of the judgment be served on the other next of kin.

Solicitors for Plaintiff: *Iliffe, Russell, & Co.*
Solicitors for Defendant *Lovesy*: *R. S. Taylor & Son.*
Solicitors for Trustees: *Pawle & Fearon.*

FLOWER *v.* BULLER.

[1879 F. 189.]

Married Woman—Separate Estate—Agreement to charge—Expectancy on Death of Living Person—Parties.

A married woman can give a valid charge on her expectancy under the will or as one of the next of kin of a living person.

And such a charge will be enforced after that person's death against separate estate bequeathed by his will to the married woman.

Pike v. *Fitzgibbon* (1) followed.

To an action to enforce such a charge the trustees of the will are not necessary parties.

17 Ch D 489-466
28 Ch D 71

THIS action was brought to enforce an agreement by a married woman to charge her separate estate.

In May, 1876, the Plaintiff *Herbert Flower* borrowed a sum of £4000 from the *Standard Life Assurance Company* upon the security of a policy of insurance upon his life and a bond, dated the 19th of May, 1876, in a penalty of £8000, by himself and the Plaintiffs Lord *Arthur Hill* and Captain *Paget* as his sureties. The money was really borrowed on behalf of the Defendant

(1) 14 Ch. D. 837.

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Captain *C. F. Buller*, the husband of the Defendant *Louisa Catherine Buller*, and the greater part of it was applied in paying debts of his, the balance being handed over to him. On the 22nd of May, 1876, *Buller* executed a bond in a penalty of £8000 in favour of the Plaintiffs to indemnify them against liability to the *Standard Company*. On the 1st of June, 1876, an agreement in writing was entered into between *Buller* and his wife of the one part, and *Flower* of the other part. This agreement contained a recital of the bond of the 19th of May, 1876; a recital that the £4000 was borrowed by *Flower* for and upon account of *Buller*, and had been received by *Buller*, who then stood indebted to *Flower*, Lord *A. Hill*, and *Paget* in the sum af £4000, and that *Buller* had entered into the bond of the 22nd of May, 1876. There was then the following recital: "And whereas the said *Louisa Catherine Buller* is or may become entitled to certain moneys under the will of her cousin *Walter Selby Cookson*, or in the event of the said *W. S. Cookson* dying intestate the said *L. C. Buller* may become entitled as one of his next of kin to certain interests in his estate, and they the said *C. F. Buller* and *L. C. Buller* have agreed to charge and make chargeable all such interest so as aforesaid expectant upon the decease of the said *W. S. Cookson*." And it was witnessed "that the said *C. F. Buller* and *Louisa Catherine* his wife do hereby absolutely assign unto the said *H. Flower*, his executors, administrators, and assigns, all the interest to which the said *L. C. Buller*, or the said *C. F. Buller*, may become entitled as aforesaid expectant upon the decease of the said *W. S. Cookson* by way of a further or collateral security to the said *H. Flower* for securing to him and the said Lord *A. W. Hill* and *A. H. Paget* the repayment of the said sum of £4000. And they the said *C. F. Buller* and the said *L. C. Buller* do hereby agree, at any time hereafter, when called upon so to do by the said *H. Flower*, his executors, administrators, or assigns, to execute any further agreement or memorandum, either by way of mortgage or otherwise, for the purpose of more effectually charging such interest as aforesaid or a good and sufficient mortgage of the same containing all necessary and proper covenants and a power of sale, the same to be prepared in all respects at the costs, charges, and expenses of the said *C. F. Buller*."

The Plaintiffs were compelled to pay the £4000, with interest, to the *Standard Company*, each of them paying one-third of the total amount. No part of what they so paid was repaid to them by *Buller* or his wife. On the 29th of July, 1879, *Cookson* died, having by his will dated the 27th of February, 1874, devised and bequeathed all the residue of his estate, real and personal, to Mrs. *Buller* for her separate use. The only Defendants to the action were Captain and Mrs. *Buller*. The Plaintiffs alleged that they joined in the bond to the *Standard Company* and lent the money to *Buller* at the request of Mrs. *Buller* and on the faith of a previous promise by her that she would give them the security which was afterwards given by the agreement of the 1st of June, 1876.

The Plaintiffs claimed a declaration that under and by virtue of the agreement of the 1st of June, 1876, they were entitled to a charge upon all the share and interest of Mrs. *Buller* in the estate of *Cookson* for the sum of £4000 and interest thereon; payment of the £4000 with interest, and enforcement of the Plaintiffs' security by foreclosure or sale; the appointment of a receiver, and an injunction to restrain the Defendants from dealing with the interest in question otherwise than for the purpose of giving effect to the charge claimed by the Plaintiffs.

By her statement of defence Mrs. *Buller*, who had obtained leave to defend separately, denied that the Plaintiffs borrowed the £4000 from the *Standard Company* or paid the same to her husband at her request on the faith of any promise or agreement by her that she would give them the security of the 1st of June, 1876, and she said that the arrangement for the loan from the company was made, and the securities completing the transaction between the company, the Plaintiffs, and her husband were given, before any suggestion was made that she should sign any document at all, and the document signed by her was signed at the request of her husband and not of the Plaintiffs or any of them, and after the transaction between the Plaintiffs and her husband was completed. She said that she received no part of the sum borrowed from the company, and never promised to any of the Plaintiffs, or any one on their behalf, that she would give any such security as was alleged in the statement of claim.

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The Defendant submitted that the document signed by her could not operate as an assignment of or charge upon the separate estate which had been since acquired by her under the will of *Cookson*, and that, being a married woman, and having at the date of the document no separate estate, she was incapable of contracting, and that the document was therefore of no force or effect as against her. She also submitted that there was no consideration for the alleged contract, and she claimed the benefit of the *Statute of Frauds* by way of defence to any claim on the part of the Plaintiffs. She further submitted that according to the true construction of the document it did not affect, or purport to affect, the property which had been in fact acquired by her under *Cookson's* will.

Captain *Buller* did not appear.

At the trial the Plaintiff *Flower* abandoned his claim so far as affected his own beneficial interest under the agreement, but he did not abandon any claim which he might have as trustee on behalf of his co-Plaintiffs. He abandoned also any claim for costs. The Plaintiffs Lord *A. Hill* and Captain *Paget* also waived any claim to interest on the sums which they had paid.

Cookson, Q.C., and *Nalder*, for the Plaintiffs:—

It is well settled that a married woman can bind her separate estate, and that a Court of Equity will make her separate estate liable to satisfy her own engagements: *Hulme* v. *Tenant* (1). The principle is that as to separate estate a married woman is in the position of a *feme sole*. In an ordinary case future property may be assigned: *Holroyd* v. *Marshall* (2). An agreement between two persons that whatever a third person shall by his will leave to either of them shall be equally divided between the two is good: *Beckley* v. *Newland* (3); and so is an agreement in marriage articles to convey to the husband a third part of what shall come to the wife's father on the death of his father: *Hobson* v. *Trevor* (4). And in many other cases agreements affecting mere expectancies have been held valid: *Wethered* v. *Wethered* (5); *Harwood* v.

(1) 1 Bro. C. C. 16.
(2) 10 H. L. C. 191.
(3) 2 P. Wms. 182.
(4) Ibid. 191.
(5) 2 Sim. 183.

Tooke (1); *Lyde* v. *Mynn* (2); *Cook* v. *Field* (3). And *Pike* v. *Fitzgibbon* (4) is a distinct authority that a general engagement of a married woman entered into on the faith of her separate estate will bind property acquired by her after the date of the engagement.

There was good consideration for the agreement: *Grey* v. *Kentish* (5); *Meek* v. *Kettlewell* (6). The evidence proves that the Plaintiffs made themselves liable to the insurance company at the request of Mrs. *Bulier*, upon the faith of an express agreement by her to give the charge on her expectancy from *Cookson*.

The trustees of *Cookson's* will are not necessary parties to the action: *Davies* v. *Jenkins* (7); *Collett* v. *Dickenson* (8).

There is a sufficient memorandum in writing of the agreement to satisfy the *Statute of Frauds*: *Bailey* v. *Sweeting* (9); *Sievewright* v. *Archibald* (10).

Lumley Smith, Q.C., and *Grosvenor Woods*, for the Defendant Mrs. *Bulier*:—

The evidence does not prove the alleged promise.

If the charge is valid to any extent, it can only affect any "moneys," in the strictest sense of the word, to which Mrs. *Buller* became entitled under *Cookson's* will. In construing wills the Court has often refused to extend the meaning of the word "money": *Collins* v. *Collins* (11). In that case it was held that the word "moneys" did not include shares and stock. In the present case a great part of *Cookson's* property consisted of debenture stock of a railway company. *Byrom* v. *Brandreth* (12) is a similar case. The cases are collected in *Jarman* on Wills (13). A deed would be construed more strictly than a will.

On the face of the agreement there appears to be no consideration for it; the Plaintiffs are bound to prove the consideration, and they have failed to do so.

(1) 2 Sim. 192.
(2) 1 My. & K. 683.
(3) 15 Q. B. 460.
(4) 14 Ch. D. 837.
(5) 1 Atk. 280.
(6) 1 Hare, 464; 1 Ph. 342.
(7) 6 Ch. D. 728.
(8) 11 Ch. D. 687.
(9) 9 C. B. (N.S.) 843.
(10) 17 Q. B. 103.
(11) Law Rep. 12 Eq. 455.
(12) Ibid. 16 Eq. 475.
(13) 3rd Ed. vol. i. p. 730.

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In the cases on which the Plaintiffs rely there had been a covenant by the married woman to pay money. *Pike* v. *Fitzgibbon* (1) is really the only authority that separate estate which a married woman had not at the time when she entered into the engagement can be bound. But in that very case Mr. Justice *Fry* refused to grant an interlocutory injunction, and on the hearing of an appeal from his decision, Lord Justice *James* expressed a strong opinion against the claim of the Plaintiff. In *Owens* v. *Dickenson* (2) there is nothing in the judgment of Lord *Cottenham* which points to any power in a married woman to charge future separate estate. The leading case on the subject is *Johnson* v. *Gallagher* (3). There it was decided that a married woman could not make a valid alienation for value of her separate estate until a decree was actually made in favour of the creditor whose debt had been contracted on the credit of the separate estate. And the observations of Lord *Langdale* in *Tullett* v. *Armstrong* (4) (which are cited by Lord Justice *Turner* in his judgment in *Johnson* v. *Gallagher* (5)) certainly lead to the inference that a married woman cannot bind separate estate which she has not got at the time of entering into the engagement. In *Pike* v. *Fitzgibbon* Vice-Chancellor *Malins* relied very much upon the form of the decree in *Picard* v. *Hine* (6), in which an inquiry was directed of what the separate property consisted at the date of the decree. But that inquiry was directed in consequence of the decision in *Johnson* v. *Gallagher*, and the object was to restrict the charge to the separate property which the married woman actually had at the date of the decree—so as to exclude from its operation any property which she had alienated between the date of the engagement with the Plaintiff and the date of the decree—not to extend its operation to separate property acquired after the date of the engagement with the Plaintiff.

Any interest which Mrs. *Buller* might acquire as one of the next of kin of *Cookson* in the event of his intestacy would not be separate estate. The idea of the agreement throughout is that the money would come to Captain *Buller* through his wife, and

(1) 14 Ch. D. 837.
(2) Cr. & Ph. 48.
(3) 3 D. F. & J. 494.
(4) 4 Beav. 319, 323.
(5) 3 D. F. & J. 515.
(6) Law Rep. 5 Ch. 274.

that the debt would be paid out of it when it came; it is not an agreement by the wife to charge her separate property, it is an assignment by the husband and wife.

Again, the only parties to the agreement are the Plaintiff *Flower* and Mrs. *Buller* and her husband. The general rule is that only the parties to a contract can sue upon it: *Tasker* v. *Small* (1). It must at any rate be shewn that the Plaintiff *Flower* entered into the agreement as a trustee for the other Plaintiffs.

The *Statute of Frauds* applies, for you cannot look beyond the written agreement except for the mere purpose of shewing the consideration for it: 19 & 20 Vict. c. 97, s. 3; *Ex parte Hall* (2). Parol evidence cannot be resorted to to shew what the agreement was, even if there is a written agreement. In the present case the obligation on the part of Captain *Buller* was to repay the amount which his three sureties had paid to the insurance company; Mrs. *Buller's* undertaking, if it amounts to anything, is to pay a debt for which the Plaintiff *Flower* was liable. That the intention was to indemnify the other sureties also cannot be proved by parol evidence.

Cookson, in reply:—

Mrs. *Buller's* own admissions prove our case. An attempt has been made to distinguish between a promise, "I will see you paid out of the legacy when it comes to me," and a promise, "I will charge the legacy in your favour." The two are of the same legal effect. When the person to whom such a promise as the first is made acts upon it by incurring a liability, Equity will give effect to it as a charge.

But the recitals in the agreement shew what the consideration for it really was.

It is said that the agreement must be construed strictly. If it is meant that Mrs. *Buller* executed it under the influence of her husband, that is equivalent to saying that it is not her deed, and she ought to have put in a counter-claim to have the agreement declared void. It would be necessary to shew that she was under duress.

(1) 3 My. & Cr. 63, 68. (2) 10 Ch. D. 615.

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As to the argument founded on the use of the word "moneys," the agreement must be construed most strongly against the person who gives the charge. And in construing wills the word "money" has not been confined to cash; the meaning must depend on the context: *Legge* v. *Asgill* (1); *Dowson* v. *Gaskoin* (2); *Chapman* v. *Reynolds* (3); *Stooke* v. *Stooke* (4). In the present case the word "interest" is used in the context, and that is large enough to include debenture stock. In *Collins* v. *Collins* (5) the words were "moneys both in the house and out of it." The former must be cash, and therefore it was held that the latter must also be cash. In *Byrom* v. *Brandreth* (6) the context was very different, and there Lord *Selborne* expressed his regret at the way in which the meaning of the word "money" had often been limited, though he felt himself bound by the authorities.

It is not necessary, as it may have been in *Hulme* v. *Tenant* (7), *Johnson* v. *Gallagher* (8), and other cases, that there should have been any covenant to pay. In those cases no specific property had been charged, whereas in the present case the foundation of the claim is an agreement to give a charge on certain specific property which is pointed out. In a Court of Equity an expectancy is treated as property, and is capable of being assigned. It is not necessary, as in the case of a voluntary deed, that a trust should have been created, for ample consideration for the agreement is proved.

As to the parties to the action, the doctrine of *Tasker* v. *Small* (9) is subject to some limitations. For instance, the assignee of an agreement may sue for its specific performance.

But even on the face of the agreement the Plaintiff *Flower* is plainly a trustee for his co-Plaintiffs, and is entitled to sue alone as representing them: Rules of Court, 1875, Order XVI., rule 7; *Fry* on Specific Performance (10); *Evans* v. *Jackson* (11); *Sanders* v. *Richards* (12). He has withdrawn his claim only so far as regards his own beneficial interest.

(1) T. & R. 265, n.
(2) 2 Keen, 14.
(3) 28 Beav. 221.
(4) 35 Beav. 396.
(5) Law Rep. 12 Eq. 455.
(6) Ibid. 16 Eq. 475.
(7) 1 Bro. C. C. 16.
(8) 3 D. F. & J. 494.
(9) 3 My. & Cr. 63.
(10) Page 39.
(11) 8 Sim. 217.
(12) 2 Coll. 568.

July 27. DENMAN, J., after stating the nature of the Plaintiffs' claim and the circumstances under which it arose, continued:— DENMAN, J. 1880 FLOWER v. BULLER.

The most difficult question, I think, which was raised with regard to the charge was a question of fact, and that arose in this way. The agreement itself was one which would not have affected the property with which it purported to deal unless it was given for consideration, not voluntarily, and unless it was given in pursuance of a previous agreement between the parties that the very thing should be done which that agreement did. It was admitted, on the one hand, that the agreement was one which would not be valid to charge the Defendant within the *Statute of Frauds* unless there were a previous agreement to do the very thing, and, on the other hand, it was admitted that, if there were a previous agreement come to between the parties to do the thing which that agreement purports and intends to do, then that agreement would be a sufficient memorandum within the *Statute of Frauds* (subject to one or two minor questions with which I must deal), but that it would be a sufficient memorandum to satisfy the *Statute of Frauds*, provided only that, before the time when it was entered into and when it was given by the Defendant Mrs. *Buller*, there had been a clear and express understanding that the property with which it purports to deal should be charged for the purpose of indemnifying or securing the Plaintiffs against the liability which they had incurred by reason of the transactions referred to in the agreement.

Now upon the question of fact a good deal of difficulty no doubt arises, partly from the lapse of time and the feebleness of memory as to details and as to times and places which was displayed by the principal witnesses, and also from the fact that there was no document upon which an argument might be raised as to whether it did or did not tend to confirm the account of the one side or of the other. Undoubtedly there is a complete conflict of evidence between the two Plaintiffs, Lord *A. Hill* and Captain *Page*, who have been examined, and the Defendant Mrs. *Buller*, not as regards one conversation in which both Plaintiffs speak of the same act and the same words, but as regards different occasions upon which both the Plaintiffs say that they had certain conversations amounting to bargains with the Defendant, and as to which

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the Defendant contradicts them both by denying positively that anything of the kind took place. Now, two preliminary questions were raised (I do not know that I ought to call them preliminary, because one does not arise until the agreement itself is considered), but two questions were raised with regard to the parties who are entitled to sue, and who are bound to be sued in order to make such a claim as the present. It was said that the Plaintiffs Lord *A. Hill* and Captain *Paget* had no right to sue, that they were not parties to the agreement, and that, therefore, the action was misconceived so far as their being Plaintiffs was concerned. It appears to me, however, that in one of two ways, and in both of two ways, indeed, the Plaintiffs are entitled to maintain the action, so far as the fact of their being parties is concerned. The action is brought upon an agreement in which are long recitals, shewing very clearly an interest in both these Plaintiffs. Both are jointly or separately interested in the agreement being performed, and, even were it not so, it appears to me to be perfectly clear, as was pointed out by Mr. *Cookson* in his reply, that, if they are not the persons actually contracting, at all events the third party with whom the agreement was actually made, the Plaintiff *Flower*, is a person who stands in the position of a trustee for them, and therefore by Order XVI., rule 7, any such objection as this would be expressly met. I think, however, beyond that, looking at the form of the agreement, that it is so entirely an agreement for the benefit of the three, that, although undoubtedly the contract is to pay to *Flower*, it is really an agreement in which all the three are interested, and upon which, even at Common Law, all the three together might sue.

Then there was another objection, that the Defendant could not be sued without her trustees, the trustees of the will of *Cookson* which passed the property upon which the charge is sought. I think that objection was met by two cases which were cited: *Davies* v. *Jenkins* (1) and *Collett* v. *Dickenson* (2). The latter case is an express authority that a charge may be declared upon property circumstanced as this is, without making the trustees parties to the suit. No doubt the judgment cannot go so far as it would do if the trustees were made parties, but, so far as it does go, as against

(1) 6 Ch. D. 728. (2) 11 Ch. D. 687.

the wife, it appears to me that these cases shew that a decree may be made declaring a charge upon the property.

Now, the question of fact which was raised is whether before, and considerably before, the 19th of May, when this transaction was almost completed by the borrowing of the money and the giving security to the insurance office, and the subsequent giving of a bond of indemnity by Captain *Buller* to the parties who had become sureties for him—whether before that there had or had not been a complete agreement between those parties and the Defendant Mrs. *Buller* that she should give a charge upon the property which might come to her under the will of her cousin, Mr. *W. S. Cookson*.

[His Lordship reviewed the evidence, and continued :—]

Taking the whole of the evidence together, I come to the conclusion that there was an express and definite promise by Mrs. *Buller*, upon the faith of which this transaction with regard to the loan was entered into, some time before the 19th of May, and that upon the faith of that promise the Plaintiffs Lord *A. Hill* and Captain *Paget* entered into the transaction, and became liable as sureties to the insurance company for the £4000 borrowed for Captain *Buller*.

Now, supposing that be so, and I find that it was so in fact, the question is, what is the effect of such a transaction? Several objections, and formidable objections in point of law, have been raised to the validity of the transaction, as to its being binding upon Mrs. *Buller*. First, it was said that the cases in which it has been held that a married woman has a right to charge her separate estate amount only to a decision that such estate is liable where the married woman had separate estate at the time at which the charge was given. Undoubtedly most of the older cases are cases in which the married woman had, not a mere expectancy under a will, but separate estate in her at the time. *Pike* v. *Fitzgibbon* (1), however, is to the contrary. It is an authority (at all events in a case where the evidence is clear that there was an intention to charge the very property which comes to the married woman) that, although she may alienate that property after the time at which the charge is given or the promise made, she is

(1) 14 Ch. D. 837.

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bound in respect of her separate property, that is to say, the separate property is bound, and *Pike* v. *Fitzgibbon* (1) appears to me to be quite consistent in principle with the opinion expressed by Lord Justice *Turner* in *Johnson* v. *Gallagher* (2), because the pith of that decision, so far as I can make it out from Lord Justice *Turner's* language, is in the passage which he quotes (3) from the judgment of Lord *Langdale* in *Tullett* v. *Armstrong* (4), that "where a married woman having separate estate, but not knowing perfectly the nature of her interest, executes an instrument by which she plainly shews an intention to bind the interest which belongs to her, then, though she may make a mistake as to the extent of the estate vested in her, the law will say that such estate as she may have shall be bound by her own act." Now, if you consider those words literally and criticise them strictly, they are applicable to the case where she had at the time an estate, but they do not at all say or go to decide that, if the estate is coming to her by a will and she chooses to charge it, when it comes by the will it would not be charged. The Vice-Chancellor *Malins* in deciding *Pike* v. *Fitzgibbon* uses an argument which seems to me to be a strong one. He says that, inasmuch as the wife by getting rid of her estate in her lifetime may defeat intentions and bargains such as these, if she have it not at the time at which the transaction comes into operation, it would follow in justice and by a parity of reasoning that, if she acquires the estate which is expressly intended to be charged in the meantime, that estate which was to be charged, and which it is part of the bargain should be charged, the charge should take effect. It would be very illogical, it would be unreasonable and unjust, if it did not.

Now, in the present case no difficulty arises on the question whether Mrs. *Buller* intended to charge this estate; she clearly intended to charge it. It was all her expectancy under the will of the cousin who had made a will in her favour, who was not likely to alter it, who was a definite person, *in rerum naturâ*, that property actually existed, and there was an intention to charge that property or none. There is no difficulty therefore in iden-

(1) 14 Ch. D. 837.
(2) 3 D. F. & J. 494.
(3) 3 D. F. & J. 515.
(4) 4 Beav. 319, 323.

tifying the property which she intended to charge. It was argued that the passage in Lord Justice *Turner's* judgment to which I have referred shews that the doctrine could only be applied to existing and not to contingent interests, such as prospects under a will, or as the next of kin of a living person. But I think that argument is answered by the cases which were cited by Mr. *Cookson*, which shew that such expectancies may be charged, and, although the question now arises as to a married woman charging her future expectancy, those cases are in point, the only difference being one arising from the particular nature of this transaction.

Then it was said that the Plaintiffs must fail, because the property actually left to the Defendant by the will of *Cookson*, except to a very small amount, did not consist of moneys, and the charge, it was said, is limited by the recitals to moneys. For this purpose it is necessary to look at the document itself, for on it of course everything turns. [His Lordship referred to the recitals and the operative part of the agreement, and continued:—]

It is said that the recital limits the operative part. I do not think it does. I am of opinion that the agreement cannot be limited in that way. The operative words are "All the interest to which the said *Louisa Catherine Buller* may become entitled as aforesaid expectant on the decease of the said *W. S. Cookson*." It appears to me that the words "as aforesaid" refer only to the words in the recital, "Under the will, or as one of the next of kin" of *Cookson*. I cannot limit them to any particular form of property. It appears to me that they are intended to operate on her whole interest, and that the recital, although a loose one, does not limit the active operative words, and that therefore the agreement operates on the whole of the property coming to her under the will.

That being so, it is not necessary to consider whether if the word used had been "moneys" only, it would have carried the debenture stock, of which the property partly consists. I am inclined to think, from the cases which Mr. *Cookson* cited, that it would, but it is not necessary to consider that if the other view is the right one.

It was further contended that the agreement was void for want

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of consideration, but it appears to me that on the very face of the agreement there is ample consideration shewn. The money was borrowed for the husband. These three persons were liable under the bond. The husband was liable for the loan, and he had got the benefit of it. The whole transaction seems to be defined with sufficient accuracy in the agreement to shew on the face of it a consideration. But it is not necessary for this purpose that the agreement should on the face of it shew the whole consideration. If there was a good consideration that would be sufficient, and that there was a consideration appears to me to be amply clear. The evidence shews that the husband and wife were living together at the time of the agreement, which was afterwards put into writing in this shape, the money to be raised was not only to free him from urgent debt, but to pay out an execution in the house in which the husband and wife were both living, and to discharge a bill for furnishing the house. There is no appearance whatever of coercion about the matter. If the story of the Plaintiffs is to be believed, and I must say that I do believe it, the purpose was not an unnatural or an unreasonable one. It was a natural and reasonable thing that, in such straits as they then were in, the wife should be ready to raise money by any means which she might have, either present or prospective, in order to pay off the debts that were encumbering them in their married life. The liability was incurred by the Plaintiffs on the faith of this very property, and they are therefore, I think, entitled to the declaration which is sought.

It appears to me that if *Pike* v. *Fitzgibbon* (1) was rightly decided it carries this case, and that I ought to make the declaration and to grant the injunction according to the prayer of the statement of claim.

MINUTE OF ORDER:—Plaintiff *Flower* withdrawing his claim so far as he is beneficially interested, declare Plaintiffs *Hill* and *Paget*, and Plaintiff *Flower*, as their trustee, entitled to a charge on all the estate and interest of Mrs. *Buller* under the will of *Cookson*, for two-thirds of the £4000 recovered under the bond of 19th May, 1876, and for Plaintiffs' costs of the action. Enquire what is the

(1) 14 Ch. D. 887.

amount secured by the charge, having regard to above declaration. Injunction as claimed. Liberty to apply as to giving effect to charge. No separate costs to *Flower*.

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Solicitors for Plaintiffs: *W. & J. Flower & Nussey.*
Solicitors for Defendants: *G. S. & H. Brandon.*

NEVILL *v.* SNELLING.

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1880
July 13, 14; *Aug.* 7.

[1879 N. 100.]

Money Lending Transaction—Unconscionable Bargain—Usurious Charges—Expectant Heir—Mere General Expectation of Property.

The principle on which a Court of Equity has granted relief from an unconscionable bargain entered into with an expectant heir or reversioner for the loan of money, applies also to the case of money being lent on unconscionable terms (not fully understood by the borrower, and known not to be fully understood by him by the lender), to a young man, being a minor at the time of the first transaction, the son of a father possessing large property, who has no property of his own and no expectation of any, except such general expectations as are founded on his father's position in life, the money being lent without any thought of repayment by the borrower, but on the credit of such general expectations, and in the hope of extorting payment from the father to avoid the exposure attendant on the son's being made a bankrupt.

THE Plaintiff was the third son of the Marquis of *Abergavenny*, and was born on the 23rd of September, 1856; the Defendant was a money lender.

In the year 1877 the Plaintiff received a circular from the Defendant, offering to lend money on personal security. The Defendant was in the habit of sending this circular to the sons of peers, whose names he discovered from a "Peerage" which he kept. The Plaintiff had no property in possession or reversion, and was entirely dependent on his father, with whom he lived. Before he attained twenty-one his father allowed him £250 a year; after he attained twenty-one the allowance was increased to £400. In June, 1877, the Plaintiff had incurred some losses by betting, and being desirous of paying his bets, and not wishing to apply to his father for money to pay them, he applied to the Defendant for a loan of £50. The Defendant agreed to make the loan on the

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terms of the Plaintiff's giving him a promissory note for £65, payable three months after date, with interest at the rate of 1s. in the pound per month from the date when the note should become due until payment. The Plaintiff accordingly on the 23rd of June, 1877, gave the Defendant a promissory note for £65, payable three months after date. Further loans were afterwards made by the Defendant to the Plaintiff, in the manner explained in the judgment, viz., £50 on the 18th of October, 1877, for which a three months' promissory note for £65 was given; £50 on the 23rd of November, 1877, for which a three months' promissory note for £65 was given; £100 on the 4th of May, 1878, for which a three months' promissory note for £125 was given; £100 on the 17th of September, 1878, for which a three months' promissory note for £125 was given; £50 on the 12th of October, 1878, for which a three months' promissory note for £65 was given; £100 on the 28th of October, 1878, for which a three months' promissory note for £125 was given; and £400 on the 20th of November, 1878, for which a six months' promissory note for £600 was given. All the notes, except the last one, were from time to time renewed by the Defendant on payment by the Plaintiff of sums which, added together, amounted to from £100 to £120 per cent. per annum on the original loans.

The writ in the action was issued on the 25th of September, 1879, and at that time the Defendant held the note for £600 and renewals of the other notes, representing altogether a sum of £1235, for which the Plaintiff had actually received from the Defendant advances amounting in the whole to £900, and had paid for renewals sums amounting altogether to £420.

By the statement of claim (par. 14) the Plaintiff alleged that "the said several loans were made by the Defendant to the Plaintiff without any hope or expectation on the part of the Defendant that the amounts secured by the said promissory notes would be paid by the Plaintiff, but on the credit of the Plaintiff's expectations as the son of a marquis, and in the hope that, rather than submit to the exposure attendant upon the Plaintiff being made a bankrupt or being sued upon such notes, the Plaintiff's father, who is, and was well known to the Defendant to be, a large landed proprietor, or some other member of the Plaintiff's

family, would pay the amounts claimed by the Defendant upon such notes."

In June, 1879, the Defendant had issued a debtor's summons against the Plaintiff for £67 4*s*., the amount of a promissory note which the Plaintiff had given to him on the 22nd of February, 1879, in renewal of that of the 23rd of November, 1877, together with £2 4*s*. for interest thereon from maturity. The Plaintiff failed to comply with the summons, and on the 26th of July, 1879, the Defendant presented a bankruptcy petition against him, alleging the non-compliance with the summons as an act of bankruptcy. On the 20th of August, 1879, the Defendant wrote to the Plaintiff's father, informing him of the Plaintiff's liability to him and of the bankruptcy proceedings, and stating that an adjudication of bankruptcy would be made against the Plaintiff on the 27th of August, unless the money was paid in the meantime. The matter was then placed in the hands of the solicitors of the Marquis, and an offer was made to repay the Defendant the £900 which he had actually advanced to the Plaintiff, less the £420 which had been repaid, with interest at the rate of 5 per cent. per annum from the respective dates of the advances. The Defendant declined this offer, and the writ was issued. By it the Plaintiff claimed a declaration that the promissory notes should stand as security only for the sums actually advanced by the Defendant to the Plaintiff, with interest at 5 per cent.; an account of the advances on the footing of this declaration, and that the Plaintiff might be at liberty to redeem on payment of the amount found due from him; and an injunction to restrain the Defendant from parting with or negotiating the notes. On the 15th of October, 1879, an interim injunction was granted by the Vacation Judge on the terms of the Plaintiff's paying £900 into Court. This sum was accordingly paid into Court, and on the 30th of October, 1879, the proceedings on the bankruptcy petition were stayed until after the trial of the action.

By his statement of defence the Defendant alleged that the Plaintiff was a free agent in the various transactions between him and the Defendant, and that he always expressed himself perfectly willing to borrow and from time to time applied to the Defendant to borrow money and renew the loans as they fell due on the terms

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proposed by the Defendant, and that the Plaintiff, until shortly before the commencement of the action, never raised any objection to the Defendant's terms. The Defendant expressly denied the truth of the allegations in par. 14 of the statement of claim. And he denied the Plaintiff's title to the relief claimed.

At the trial it was admitted by the Defendant that his claim, so far as it was founded upon the first note for £65 and the renewals of that note, could not be sustained, because the first note was given by the Plaintiff during his infancy.

The Plaintiff and the Defendant were both examined at the trial. The effect of the evidence is fully stated in the judgment of the Court.

North, Q.C., and *E. Ward*, for the Plaintiff:—

The Defendant has himself admitted in letters that the provision as to the payment of interest at the rate of 1s. in the pound per month, in the event of the non-payment of the notes when they became due, is a penal clause. So that, even if the Plaintiff is not entitled to the whole relief which he claims, he ought to be relieved from that penalty, and ought only to pay 5 per cent. interest on the amount of the notes.

The principle of the *Earl of Chesterfield* v. *Janssen* (1) applies, though the Plaintiff was not, strictly speaking, an expectant heir or a reversioner, for the money was lent on the faith of his expectations founded on his position in life, and the hope that his father, or some other relations, would pay his liabilities rather than allow him to be driven into bankruptcy. In such cases the Court will only allow the bills or other securities which have been given to stand as security for the sums actually advanced, with interest at a reasonable rate: *Croft* v. *Graham* (2). The repeal of the usury laws has not affected the doctrine of the Court as to dealings with expectant heirs: *Earl of Aylesford* v. *Morris* (3). The description given by Lord *Selborne* (4) of the Plaintiff in that case is equally applicable to the present Plaintiff; he was "in the dark, and in fetters, without either the will or the power to take care of himself, and with nobody else to take care of him." It is

(1) 2 Ves. Sen. 125.
(2) 2 D. J. & S. 155; S. C. 5 Giff. 1.
(3) Law Rep. 8 Ch. 484.
(4) Ibid. 492.

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not necessary that security should have been given upon any specific property. The question is, whether, looking at the position of the parties, there has been a hard and unreasonable bargain, not whether there has been actual fraud: *Beynon* v. *Cook* (1). The principle applies to all cases in which, on the one hand, there is a demand for very unreasonable terms, and, on the other hand, a young man, even though of full age, without any means. If one of the parties is *primâ facie* in a position to take advantage of the other, the *onus* is on the Defendant to shew that the transaction was a fair one: *Croft* v. *Graham* (2); *Bromley* v. *Smith* (3). In *O'Rorke* v. *Bolingbroke* (4), Lord *Hatherley* said (5), "in the case of the 'expectant heir,' or of persons under pressure without adequate protection, and in the case of dealings with uneducated, ignorant persons, the burthen of shewing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract," though in that case the majority of the Lords held that the Appellant had fully satisfied the *onus*. The circumstance that the first loan was made while the Plaintiff was under twenty-one strengthens his case: *Tyler* v. *Yates* (6). It does not affect the Plaintiff's title to relief that the money was lent on the faith of his general expectations, and not the expectation of any particular property.

[DENMAN, J.:—I should say rather that it was lent upon the faith that somebody else would pay for him, his father probably. The inference I draw is that the Defendant's expectation, his primary idea, was that the father would come down with the money at the proper time.]

The Defendant offered the Plaintiff a bait that he might be able to indulge in pleasures of which his own means would not admit, that he might in fact be independent of his father. The object was that he should come to ruin by indulging in betting and other extravagance. The money was lent for the purpose of "feeding riot," as was said in *Earl of Chesterfield* v. *Janssen* (7). Such a transaction a Court of Equity will not support. In *Earl*

(1) Law Rep. 10 Ch. 389, 391.
(2) 2 D. J. & S. 155.
(3) 26 Beav. 644.
(4) 2 App. Cas. 814.
(5) Ibid. 823.
(6) Law Rep. 6 Ch. 665.
(7) 2 Ves. Sen. 125.

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of Chesterfield v. *Janssen* (1), the borrower had a large income in possession, and had a *bonâ fide* expectation of succeeding to other large property, and the money was borrowed to pay debts, and the Defendant had previously declined the security offered, and yet the transaction was set aside. The principle on which the Court then acted applies more strongly to the present case. The sum of £15 charged on the amount of each note is not interest but damages: *Cook* v. *Fowler* (2). The Defendant is not entitled to more than 5 per cent., and, as this was offered to him before the writ was issued, he ought to pay the costs of the action.

Cookson, Q.C., *Everitt*, and *Glyn*, for the Defendant:—

The claim put forward is novel. It is said that a young man, who has no expectations, but whose father is in a good position, and who obtains money from a money lender, may any number of years afterwards turn round and treat him as if he had borrowed the money on good security, when in fact he had no security whatever to offer. The Plaintiff does not even offer to pay reasonable interest, having regard to the nature of the risk. If his claim is well founded, a person who borrows money on no security will stand in as good, or even a better, position than a person who borrows on good mortgage security. No doubt, if the money had been lent on any expectation of the Plaintiff's succeeding to the *Abergavenny* estates, the peculiar doctrine of equity as to loans to expectant heirs would apply, as in *Earl of Chesterfield* v. *Janssen*; but there is no authority for saying that this doctrine applies to a case where money is lent on the mere expectation that some one will come forward to pay it. Indeed, in *Gwynne* v. *Heaton* (3), Lord *Thurlow* said (4): "The heir of a family, dealing for an expectancy in that family, shall be distinguished from ordinary cases, and an unconscionable bargain made with him shall not only be looked upon as oppressive in the particular instance, and therefore avoided, but as pernicious in principle, and therefore, repressed." The principle of the cases is that it would be a fraud on the ancestor to prevent the family estates from descending as he intended that they should. There can be no fraud on an

(1) 2 Ves. Sen. 125.
(2) Law Rep. 7 H. L. 27.
(3) 1 Bro. C. C. 1.
(4) Ibid. 9.

ancestor from whom nothing is expected. If the existence of any vague expectation is a sufficient ground for relief, it really comes to this, that any loan transaction may be set aside if more than 5 per cent. interest is charged. It is said that the Defendant encouraged the Plaintiff to borrow money for purposes of extravagance, and to conceal what he was doing from his father, but there is no authority which shews that that is a ground for relief. Nor is it a sufficient ground that the parties were not on equal terms In *Beynon* v. *Cook* (1), *Jessel*, M.R., said (2): "The usury laws no longer being in force, persons may make hard bargains with persons entitled to property in possession, or entitled to no property at all." And in an unreported case of *Bennett* v. *Bennett*, *Jessel*, M.R., said that a man is allowed by law to be a fool if he likes. In that case interest at the rate of 60 per cent. was allowed. The Plaintiff is asking to be relieved from the consequences of the follies of his youth; he knew what interest he was paying, and he has really no case. If he had any expectation of succeeding to the family estates, it was too remote to be taken into account. In *Beynon* v. *Cook*, *Jessel*, M.R., said (3): "It has never been said a man can be relieved because he happens to be a reversioner, and the money lender does not know it, but lends him money upon his promissory note at usurious interest." In all the cases relied upon the plaintiff had real expectations. In *Earl of Chesterfield* v. *Janssen* a *post-obit* (4) bond had been given. In *Croft* v. *Graham* (5) the plaintiff was tenant in tail in remainder of land. In *Tyler* v. *Yates* (6) a mortgage of a reversionary interest had been given. In *Earl of Aylesford* v. *Morris* (7) the plaintiff was the heir to large family estates. In *Beynon* v. *Cook* the plaintiff was a reversioner. In *O'Rorke* v. *Bolingbroke* (8) the transaction was a sale of a reversion. A loan to pay gambling debts is not illegal: *Ex parte Pyke* (9). The Plaintiff was a free agent throughout, and knew his position. The sums charged for discounting the notes will not be disallowed: *Benyon* v. *Fitch* (10). And the interest charged on

(1) Law Rep. 10 Ch. 389.
(2) Ibid. 392.
(3) Ibid.
(4) 2 Ves. Sen. 125.
(5) 2 D. J. & S. 155.
(6) Law Rep. 6 Ch. 665.
(7) Ibid. 8 Ch. 484, 499.
(8) 2 App. Cas. 814.
(9) 8 Ch. D. 754.
(10) 35 Beav. 570.

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the overdue notes was not unreasonable, having regard to the risk. The fact that the Defendant spoke of this provision as a "penal" one cannot alter his rights. The offer made before the action was commenced was not a sufficient one, as it did not include the discount, and therefore the Plaintiff ought at any rate to pay his own costs. In *Earl of Aylesford* v. *Morris* (1), no costs were allowed to the plaintiff, on the ground that he was asking to be relieved from the consequences of his own folly.

North, in reply:—

In *Bennett* v. *Bennett* the borrower was in possession of estates of large value, and was under no pressure. The present Plaintiff's position was very different. In several of the cases the plaintiffs were older than the present Plaintiff, as in *Earl of Chesterfield* v. *Janssen* (2); *Beynon* v. *Cook* (3); *Benyon* v. *Fitch* (4). The Defendant evidently sent his circular to the Plaintiff because he found his name in the Peerage, and thought that from his position in life, and the position of his father, it was probable that he would ultimately come into considerable property.

Aug. 7. DENMAN, J.:—

The Plaintiff in this case is the third son of the Marquis of *Abergavenny*. He first became acquainted with the Defendant in the following manner: The Defendant, who is a money lender, kept a "Peerage," and was in the habit of sending out to persons whose names are in that book lithographed circulars offering "to lend money to any amount on simple note of hand, or to arrange loans at 5 per cent. on reversions and every kind of security." One of these circulars reached the Plaintiff some few months before he came of age. He did not immediately take notice of it, but on the 19th of June, being then about three months under age, he wrote to the Defendant as follows:—

"You wrote a short time since to say you would advance me money if I should at any time be in want of any. I write to say I want to borrow £50 until October 1st. Will you kindly send

(1) Law Rep. 8 Ch. 484, 499.
(2) 2 Ves. Sen. 125.
(3) Law Rep. 10 Ch. 389.
(4) 35 Beav. 570.

me a line to say when you will be at home, and I will call on you."

No immediate answer was sent, but on the 8th of July the Defendant wrote:—

"I beg to say I should be glad if you could get a friend to join you in a bill, as the fact of your being under age makes it difficult to advance you."

To this the Plaintiff, on the 11th of July, replied: "Asking any one to go shares in a bill is a thing I shall never do."

Soon afterwards the parties met. Very little conversation seems to have taken place between them. No inquiry appears to have been made by the Defendant as to the particular expectations of the Plaintiff. The Defendant knew that he was the third son of the Marquis, a nobleman in possession of large estates, that he was living with his father, and that he was then a minor. The Defendant stated that his only reason for offering to lend the Plaintiff money was that he found his name in the Peerage, from which he also knew that he was a minor at the time. The Defendant admitted that he then learned from the Plaintiff that he had an allowance from his father, which was to be increased on his coming of age. But he said he thought it a matter of no importance, and did not consider how he was to be repaid, nor care. In his examination the Defendant attempted at first to deny that he at all contemplated the probability of his being paid by the father or friends of the Plaintiff, in case the Plaintiff should himself be unable to pay, but he afterwards admitted that from the first he contemplated the probability of being paid by the father, to prevent exposure and bankruptcy in case he should find the son unable to pay. I am convinced, in spite of the Defendant's original denial, that from the first the main reason which induced him to advance money upon the Plaintiff's personal security was the expectation that, if the Plaintiff himself should not be able to pay, the Plaintiff's father or friends would be likely to pay, so as to prevent bankruptcy or exposure. I have no doubt that he also relied to some extent upon a general expectation that the Plaintiff would probably at some time or other become entitled to an interest in the family estates. The Defendant, according to his own account, abstained from making any in-

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quiries, beyond what the Peerage satisfied, which informed him that the Plaintiff was a minor, and was the third son, and that one of his elder brothers had a son. The first note given by the Plaintiff was for £65, and was dated the 23rd of June, 1877, the advance of £50 having been made some weeks afterwards, and it was made payable to the Defendant's order three months after date, with interest at the rate of 1*s.* in the pound per month from the date when it should become due. All the subsequent notes were in the same form. The first note was renewed from time to time as three months elapsed, so that between July, 1877, and the 21st of March, 1879, the total amount paid upon the note and its renewals was £105, the only sum received on it having been £50, and that not until two or three weeks after the day on which the note was dated. It was admitted that the Defendant had no right to rely upon this note and its renewals, by reason of the *Infants' Relief Act* of 1874, each renewal being a mere ratification of a contract rendered void by that Act, and, therefore, being itself incapable of being the foundation of any action or proceeding. On the 4th of August, 1877, the Plaintiff, being still under age, wrote to the Defendant asking for a further loan of £50. The Defendant being then absent, no notice was taken of this application. On the 17th of September the Defendant wrote to remind the Plaintiff, who was still under age, of the first note for £65, which would become due on the 23rd of September, adding: "which I shall be pleased to renew if you wish." On the 20th of September the Plaintiff, being still under age, wrote to the Defendant: "I shall feel obliged by your renewing the bill, and will send you a cheque for £15, which I believe to be the correct amount." On the 23rd of September, being the day on which the Plaintiff, according to the popular notion, came of age, he sent the Defendant a cheque for £15, the receipt of which the Defendant acknowledged on the 24th, adding: "I have a considerable amount of spare cash, and if you require money I shall be happy to let you have it." Pausing at this stage, I can find no particle of evidence that there was any bargain at all as to the terms of renewal, and it appears to me to have been a mere blunder of the Plaintiff, of which the Defendant unconscientiously took advantage, when he sent £15 to the Defendant for the

interest to become due upon the first note, instead of £9 15s., the sum really due at the rate mentioned in the note, viz., 1s. in the pound per month. It really was a prepayment of the interest for the next three months, with an over-payment of £5 5s., in the absence of any agreement at all as to any fresh sum being payable upon renewal. This vice appears to me to run through the whole of the subsequent transactions, for the Plaintiff, until he became heavily indebted to the Defendant, never discovered his mistake, and the Defendant never in any way corrected it, nor took any steps to have a real understanding in the matter. The Plaintiff did not at once yield to the offer of further loans contained in the letter of the 24th of September, but only sent back the new note signed, for which he received an acknowledgment. On the 17th of October, however, being now of full age, and in receipt of an allowance from his father of £400 instead of £250, he asks the Defendant for a cheque for £50, with a note, "which I will send back signed by return of post," for £65. The second note was thereupon sent and signed by the Plaintiff in exchange for the £50, and on the 22nd of October the Defendant, acknowledging its receipt, adds: "In the event of your wanting further sums, I shall be happy to place them at your disposal." This note was renewed quarterly six times, down to the 15th of April, 1879, and upon each renewal £15 was paid, so that for the original advance of £50 the Plaintiff has paid altogether £90 in a year and a half, with no agreement except that contained on the face of the notes themselves, and obviously under the mistaken notion that this had been the original bargain on the first note. On the 23rd of November, 1877, another £50 was advanced on another note for £65, on which, down to the 23rd of February, 1879, £75 has been paid by the Plaintiff in five quarterly payments upon renewals. This £50 was advanced in answer to a letter saying, "I have overdrawn my account." On the 27th of December, 1877, the Defendant, acknowledging the Plaintiff's cheque for £15 and inclosing the second renewal of the first note, adds: "If you should at any time require a further advance, I need not say it is at your service."

It is not necessary to describe the various letters which passed on the renewals of the first three notes; the Defendant, generally

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informing the Plaintiff that the time for payment of each is drawing near, adds that he shall be happy to renew the note, and the Plaintiff sends the cheque for £15 as a matter of course on receiving the renewed note for his signature.

On the 3rd of May, 1878, the Plaintiff wrote to the Defendant and asked for a loan of £100, to pay for a horse he had just bought, and that it might be on easier terms than the last, suggesting that the note should be for £120. The Defendant, on the 4th, sent a cheque for £100 and a note for signature for £125, adding, "which is placing you on better terms than before." There is no other evidence that the Plaintiff, down to this time, had ever complained of the terms on which he was obtaining loans from the Defendant, but there is no evidence, except such as is to be gathered from the correspondence and from the notes themselves, of any terms having ever been agreed upon for discount or as the cost of renewal. No other correspondence took place between the parties, except as to the renewal of the notes then in existence, until a day or two before the 17th of September, 1878, when the Plaintiff wrote to the Defendant, "I lost £300 at *Doncaster*, so must ask you to let me have another £100. Please make out bill for £120 and send it by return with cheque for £100." On the 17th of September the Defendant sends a cheque for £100 and a note for £125 at three months, making the fourth transaction since the Plaintiff came of age about a year before, and making the total amount advanced £350 on notes for £445. On the 12th of October a further advance of £50 is made, and a fresh note for £65 given, in consequence of "rather a bad race at *Newmarket*." And, on the 28th of October another £100 is advanced, upon a note for £125, in response to a letter saying, "I have played the fool at *Newmarket* again."

I now come to the last transaction. Shortly before the 8th of November, 1878, the Plaintiff wrote to the Defendant, "I want to borrow £400 at six months; will you kindly send it by return together with bill?" The Defendant answered on the 8th of November, "I shall be very pleased to let you have it if you will get a friend to join you in the bill." The Plaintiff answered, "getting a friend to back a bill is a thing I don't like doing," and repeats his request for a cheque for £400, on a bill at three

months for £500, adding, "I would sooner borrow the money from you than from any one else, as so far I have done all my business with you, and I am sure I pay good interest." On the 11th the Defendant replied that asking a friend's name was only an ordinary business precaution; that he would lend £400 in exchange for the bill inclosed for £600 at six months, and that "the name of any friend would do." The Plaintiff sent back the note because it was made out for three months instead of six, and stated that he had got a friend (who turned out to be his own valet) to back it. On the 16th of November the parties met and discussed the terms of a loan, but nothing was settled until, on the same evening, the Defendant wrote to the Plaintiff that he would let the Plaintiff have £400 without a second name, if he would wait a week, and pledge his word of honour that the whole of his debt should be paid in full, and inclosed a note for £600 dated the 20th of November. The Plaintiff, on the 17th, replied, inclosing the note for £600 signed, expressing his gratitude, and giving his word of honour that, when all the money he owed the Defendant was paid off, it should be paid in full. The Defendant, on the 23rd of November, inclosed his cheque for £400. On the 29th the Defendant inclosed a note for £65, in renewal of the note for that amount of the 23rd of November, 1877, and asking that it might be returned signed, with a cheque for £15. The Plaintiff, on the 30th of November, 1878, sent back the bill signed, but with a cheque for £9 15*s.* instead of the £15 demanded. Thereupon the Defendant, on the 30th, writes, "I am in receipt of your letter and new bill, also a cheque for £9 15*s.*, which amount I do not understand at all. I must ask you to send me the balance £5 5*s.* by return." The Plaintiff, on the 2nd of December, answers, "The cheque for £9 15*s.* is the interest on the £65 for three months, viz., 1*s.* in the £ per month;" to which the Defendant replies, on the 3rd of December, "I must positively decline to accept less than the usual sum of £15 to renew your bill. I must request that you will send me the balance of the interest, five guineas, by return of post, or that you will as promptly take up your bill by remitting me the sum of £55 5*s.*" He then reminds the Plaintiff of a note for £125 coming due on the 17th, and one for £65 on the 21st. The P. S. to this letter was as follows: "Your

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lordship will observe that the clause, with interest thereon at the rate of 1*s.* in the pound per month, from the date same becomes due until paid, has nothing to do with the interest for renewing the bill, and is what may be termed a penal clause, and only comes into effect in event of the bill not being renewed."

It is to be observed that the Defendant does not assert that there had ever been any agreement that any amount beyond interest in advance should be charged upon each renewal. In the letter of December the 3rd he spoke only of the "usual sum," and in this letter he gives an explanation which was not calculated to enlighten the Plaintiff as to the principle on which he had received any such payments. In fact they originated in the blunder of the Plaintiff, when still under age, on the 20th of September, 1877, taken advantage of by the Defendant, without notice, on every occasion of renewal down to this time. The Plaintiff, on the 4th, inclosed a cheque for five guineas, and added, "You must not blame me if I take a third person's advice." The Defendant answers on the 5th of December, acknowledging the five guineas, and adding, "I cannot renew your bills at a lower rate than I charged to discount these. I always put the same penal clause in my bills, never making it at a higher rate than a shilling in the £ per month. I do not think you need trouble to take any third person's opinion on the subject, as I should not alter the terms on which I have always done business with you, as rather than do so I should prefer the bills being taken up at maturity." After this the Plaintiff paid several sums as before on the renewal of bills, viz., £25 on the 17th of December; £15 on the 3rd of January, 1879; £15 on the 27th of January, 1879; and £25 on the 3rd of February, 1879; but on that day the Plaintiff inclosed his cheque in a letter containing the following: "I should like also to know when the next bill becomes due, and the amount of bills you hold. I am trying to borrow money of a friend to take them up, as really the interest you charge is so great that it takes nearly all my allowance. I don't wish to complain, as you have always treated me very well, but of course you won't blame me if I can get money at £15 or £20 per cent. per annum, instead of paying what I do at present." On the 4th the Defendant wrote, "Your remarks with regard to the interest you have to pay out of your allowance are

perfectly just—you will remember I explained to you that was the reason I hesitated about the last loan. If you would get two friends to join you in a bond, I think I could obtain you about £2000, payable by easy instalments extending over several years, at £7 or £8 per cent. per annum." There is no evidence as to when the conversation alluded to in this letter had taken place, but it clearly shews that, at the time when the Defendant advanced the last loan of £400 (viz., in November, 1878), he was aware that he was advancing a whole year's allowance to the Plaintiff, and that with knowledge that the money was being borrowed to pay gambling debts to a large extent, for as early as September, 1878, the Plaintiff had begun to give this as a reason for borrowing more. In this letter a statement was inclosed shewing eight bills for £1235 in the whole, falling due at several dates mentioned between the 2nd of February, and the 20th of May, 1879; some of these bills were renewed in the same manner as before on the 13th of February, the 4th of March, the 2nd of April, the 8th of April, the 24th of April, and the 1st of May. On the 9th of May the Defendant writes asking for £25 "interest" on a bill overdue since the 28th of April, and complaining of the delay there has been for some time past in the renewal of the Plaintiff's bills. To this the Plaintiff replied, "I think you ought not to complain of the delay, considering the interest you charge." The Defendant answered, "If it does not suit you to pay the interest regularly, I shall be very glad to be paid by you, as I can get as good interest from other clients." On the 19th and 21st the Defendant again writes, reminding the Plaintiff of two overdue bills, and asking for £50. The Plaintiff replies, sending a post-dated cheque, dated the 7th of June, for £250, for the £50, with £200 for the renewal of the £600 bill, adding that he will not before that time be in funds. And on the 9th of June he writes that his bankers refuse to honour any more cheques, and that the only course is to place their transactions in the hands of his father's solicitors. On the 16th the Defendant writes, asking the Plaintiff to take up his cheque for £250 at once, and declines to accept any abatement. On the 18th the Defendant's solicitor demanded immediate payment of one of the overdue notes for £65, and inclosed particulars "pursuant to the *Bankruptcy Act*, 1869." On the

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19th he repeated that demand, and on the 3rd of July wrote, announcing that he had issued a debtor's summons, and on the 25th of July, that he had filed a petition in bankruptcy. This petition was not at once proceeded upon, the Defendant's solicitor having written two or three letters, in one of which, on the 6th of August, he wrote, "My client suggests that you should speak to your friends in reference to this matter, or, if you prefer it, my client will communicate with them himself." In that letter he says, "I was to-day in a position to adjudicate you a bankrupt, but, fearing it might have escaped your memory, I got an adjournment to the 27th of this month at twelve, when I shall be compelled to adjudicate unless some arrangement is made." On the 20th of August the Defendant himself wrote to the Plaintiff's father as follows: "My Lord, I am the holder of promissory notes of your son Lord *George Nevill* to the amount of £1368 2*s.* 6*d.*, in consideration of cash advanced at various times. The notes are overdue, and my solicitor has taken proceedings against Lord *George* which culminated in a petition in bankruptcy returnable some days ago. Lord *George* did not think fit to attend, and an adjudication in bankruptcy could have been made against him. But I thought it advisable to adjourn until the 27th, in order that I might lay the matter before your lordship. On the last-named day the adjudication will be made unless in the meantime the money be paid." On the same day the Plaintiff wrote to the Defendant, suggesting that the Defendant should acquaint his father, but this letter was written on the advice of a friend, and the Defendant did not receive it until after he had sent his own letter of the same date. I have no doubt whatever that the Defendant wrote this letter entirely of his own accord, and that it was written in accordance with his original intention, formed at the time when he lent the first £50 to the Defendant and continued throughout the whole of his dealings, that, whensoever the Plaintiff might fail to pay, or to renew the notes upon such terms as he might extort, he would, by threats of bankruptcy and exposure, work upon the Marquis's feelings, and so endeavour to obtain payment of the notes and the £60 per cent. stipulated to be paid upon their amount. The matter having been placed in the hands of the Marquis's solicitors, they wrote to the Defendant's solicitor. [His Lordship

referred to this letter, which contained an offer on behalf of Lord *Abergavenny* "to pay your client the actual amount of cash advanced, that is to say, £900 less £420 which has been repaid, together with simple interest at £5 per cent. on such advances from their respective dates, upon all the acceptances being given up and a receipt in full discharge given by your client," and continued:—] The Defendant declined this offer, and determined to proceed in bankruptcy, and declined to give any undertaking not to negotiate the bills pending proceedings.

The Plaintiff brought this action on the 25th of September. [His Lordship referred to some of the allegations in the statement of claim, and continued:—] I think the true inference to be drawn from the evidence is, that the Defendant must have known that the Plaintiff was borrowing money at most outrageous interest from him, and with the object of obtaining money unknown to his father. Until the letter of the 4th of December, 1878, I do not think that there is any indication that the Plaintiff remonstrated as to the terms charged, but I think it clear that, down to that time, a large portion of the money he had paid to the Defendant was paid upon a misunderstanding of the nature of each transaction, and in consequence of the advantage taken by the Defendant of his original blunder, while still a minor, as to the nature of the document he had first signed, and his liability in respect of it. But he did then remonstrate, and I have no doubt that from that time he would not have gone on paying such interest, or submitting to pay such sums on renewal, but for the fact that he was already so largely indebted to the Defendant, and so much at his mercy if he ceased to renew his bills, that he had not the fortitude to resist the terms insisted on. Nor have I any doubt that the last and largest advance was made with full knowledge that it would be utterly hopeless for the Plaintiff to pay it, and with the deliberate intention of extorting it from the father to save bankruptcy and exposure.

Paragraph 14 of the statement of claim, I think, accurately describes the facts. [His Lordship read it.]

Upon the argument before me numerous cases were cited on both sides, none exactly in point, but many of them throwing light upon the question how far a Court of Equity can interfere

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with transactions more or less similar to the present. I have had considerable difficulty in making out to what extent the cases relied upon are to be considered as wholly or mainly turning upon the fact, that the person seeking to be relieved from a bargain was an expectant heir or reversioner. Many of the cases no doubt are based entirely upon that ground, coupled with the hardness of the bargain, and cannot be considered as authorities applicable to any other case. Yet, in many of the cases, the Court appears to have proceeded to set aside the transaction complained of on grounds which seem to be quite as applicable to the case of an improvident young man who falls into the hands of a professional money lender and gets deeper and deeper into debt, the money lender trading upon the probable unwillingness of the young man's relations to let him and his family be exposed by bankruptcy, as to the case of an expectant heir being led into an improvident bargain by a money lender of the same description. It is very difficult to see any very solid distinction as regards the morality of the two transactions; and I cannot myself perceive that the money lender who trades upon the hope of eating up a slice of a large family estate upon the death of its present owner is a being at all more unconscientious or worthy of correction by a Court of Equity than the money lender who trades upon the dread of exposure of the vices and follies of their children, which is likely to force parents of adequate means or honest names, whether they be rich peers or persons of more moderate estate, to pay interest, however usurious, rather than see their children figure in the Bankruptcy Court. But it must be admitted that a distinction, and a strong distinction, has been drawn in Courts of Equity between the one case and the other, and that, whereas it is easy to find cases in which the Court has interfered in favour of persons who have submitted to hard bargains with money lenders on the security of property to which they would be entitled, it is not easy to find cases in which such interference has taken place in favour of other persons who have borrowed money at interest however usurious, and for purposes however foolish. Still I do find, even in cases relating to expectant heirs and reversioners, that stress is often laid so very much more upon other considerations than upon this circumstance, that it is impossible to say that

it appears clearly from the cases, as a whole, that the Court will not interfere in any given case, though it may be a case in which that particular ground for interference does not exist. In *Croft* v. *Graham* (1) the plaintiff was tenant in tail of a small landed property, subject to his father's life interest, and had given securities on his expectations in consideration of the delivery up of bills and notes given by him to the defendant for money lent at various times at interest at £60 per cent. Vice-Chancellor *Stuart* had ordered that the judgment entered up on the securities should stand as a security only for the sums actually advanced, and £5 per cent. interest, and, though the case was treated as one of an expectant heir, the circumstances relied upon by the Lords Justices as grounds for affirming the decision are in their nature unconnected with that fact (except so far as the mere statement of the fact is concerned), and many of them are just as applicable to a case like the present. Lord Justice *Knight Bruce's* judgment contains (2) the following passage: "There is not a material fact in dispute from beginning to end. The plaintiff was a young extravagant Oxonian, entitled in remainder or reversion expectant on the decease of his father to estates, which do not appear to be very large. The income allowed him was about £180 a year, which he found insufficient to meet his expenses. He was introduced to the defendant, a money lender, and dealings took place between them during the plaintiff's minority. . . . Throughout these transactions the parties were not on equal terms, but one of them was in the power of the other. It would be a disgrace to the Court if these securities were allowed to stand for more than the moneys really advanced, with interest at a reasonable rate." Lord Justice *Turner* added (3): "I do not see how the Vice-Chancellor could have done otherwise than make a decree in favour of the plaintiff, unless he had affirmed Mr. *Cracknall's* proposition, that the repeal of the usury laws has altered all the rules of this Court as to dealings with expectant heirs." The only distinction in favour of the Defendant between that case and the present seems to me to be, that there the plaintiff had given a security upon a definite expectancy, whereas in the present case no such

(1) 2 D. J. & S. 155. (2) 2 D. J. & S. 160.
(3) 2 D. J. & S. 161.

DENMAN, J. security was given, but the Defendant advanced money from time to time on such general expectations as he had formed from the knowledge of the Plaintiff's rank and parentage, and in the hope of extorting payment from his friends, if he himself should fail to pay the enormous interest secured by the promissory notes taken by the Defendant for his advances. In all other respects the case appears to be as strong or stronger. The first transaction in this case was one arising from the Defendant's officious offer to lend money to any amount on simple note of hand, sent to the Plaintiff during minority. The first transaction by which the Defendant got the Plaintiff into his debt was completed during his minority. The Defendant at this early stage of the transactions in question may fairly be described in the language of the great advocates who appeared for the defendant in *Earl of Chesterfield* v. *Janssen* (1) as "a person looking out for young men to prey upon." Then it is clear that the Defendant knowingly allowed the Plaintiff to renew the first note at a rate not previously agreed upon, in ignorance of the effect of what he had agreed to, and under a misapprehension of the true effect of what he had originally bound himself to, and with no fresh agreement to the terms upon which he afterwards insisted. The interest actually agreed upon by the Plaintiff was £60 per cent. on the amount of the notes, or £78 per cent. on the amount of the advances; the sums actually taken upon renewal, without any clear understanding between the parties, amount to payments at the rate of £120 per cent. on the sums actually received by the Plaintiff. The second transaction took place on the day on which the Plaintiff came of age. And, before fourteen months had elapsed the Plaintiff, who was, during the last and largest transaction, known to the Defendant to be getting deeper and deeper into debt and difficulties by reason of gambling and extravagance, had given the Defendant notes amounting in the whole to £1235, for actual advances of only £900, and had paid more than £400 upon renewals really based upon his own miscalculation of the interest mentioned in the notes, of which the Defendant had at first coolly taken advantage, and which, when the Plaintiff discovered his mistake, was turned into a demand as the price of further renewals. The Defendant knew from the

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(1) 2 Ves. Sen. 125, 133.

first that the Plaintiff had no other means than an allowance from his father, which, of course, he must have known he was exceeding, and, before he made the last advance, he knew that the allowance the Plaintiff was receiving would be more than twice swallowed up in a single year by the liabilities he was incurring to the Defendant alone. I can see no ground for drawing a distinction in favour of the money lender in this case as compared with that of *Croft* v. *Graham* (1), so far as the merits of his conduct are concerned. *Earl of Aylesford* v. *Morris* (2) was, of course, relied upon for the Plaintiff. The plaintiff in that case had, partly before and partly after coming of age, become indebted to one *Graham* on acceptances for £4000 in all. *Graham* introduced him to the defendant, who paid *Graham* £3000, and advanced £3800 to the plaintiff, and took his acceptances at three months for £8000 (a more moderate discount than was charged upon any of the notes in the present case.) The bill for £8000 having become due in October, 1870, after negotiation *Morris* took a fresh bill for £11,000, all but about £500 of which was for discount. A policy had also been given on the advance of the £8000. There was no charge given upon the reversionary estate of the plaintiff, though in fact he was entitled to large estates in reversion. Vice-Chancellor *Wickens* having made a decree for the delivery up of the bills and the policy, on payment by the plaintiff of the amounts actually advanced and interest at 5 per cent., the case was heard on appeal before Lord *Selborne*, L.C., and Lord Justice *Mellish*. The cases on the subject were very fully discussed, and one of the arguments for the defendant, which was strongly relied on, was, that the case was one of a mere personal loan, and not of a sale of a reversion, or of a loan upon security. The facts of that case no doubt disclosed a much more reckless course, so far as the amount of indebtedness is concerned, on the part of the plaintiff than appears in the case before me, but in many respects the two are very similar. The transactions with *Graham*, out of which the indebtedness of the plaintiff in that case grew, began during minority. The Defendant in the present case was himself the original dealer with the Plaintiff during his minority. In both cases the money lender, to use Lord *Selborne's*

(1) 2 D. J. & S. 155. (2) Law Rep. 8 Ch. 484.

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words (1), "purposely abstained from making any of those inquiries which every man would have made who was entering into a business transaction fairly and in good faith, without either an irrational disregard of his own security, or a design to make his market of another man's weakness. He looked at the Peerage, and ascertained the age of the plaintiff's father, and, no doubt, the age of the plaintiff himself also." In both cases the interest was, not merely usurious, but enormous. In the present case there is an element of unconscientiousness which I do not find in the other, in the allowing the Plaintiff to remain under the impression that he was bound to terms of renewal which would increase his liabilities by the amount of £40 per cent. per annum, which impression he must have known was a mere blunder of the Plaintiff's, and as to which there was no pretence for alleging any bargain, except when the Plaintiff, after remonstrating, and when in the power of the Defendant, went on paying at the same rate, rather than face the alternative of exposure or bankruptcy, which the Defendant throughout looked to as his weapons for enforcing payment of his claims, by putting pressure upon the Plaintiff's father. Lord *Selborne*, in dealing with the argument that the equity as to catching bargains with expectant heirs was not applicable to the case, made the following observations (2): "Whatever form these transactions might assume, the fact was, and it was well understood by the appellant, that the plaintiff was trusted upon the credit of his expectations, that is, of his prospect of succeeding on the death of his father to the family estates. He had no property in possession, but he had this property" (a reversionary estate as tenant in tail upon the death of his father), "and anything else besides which he might get from his father, in prospect." So far the Lord Chancellor would seem to be meeting the argument by questioning or denying the facts upon which it was based. But he proceeds (3): "The truth is, that such terms as those imposed on the borrower in the present case are not less, but are more onerous and unconscionable than if a deferred security upon the reversionary interest had been taken. It was certain that the debtor, until his reversionary interest fell into possession, would never have any

(1) Law Rep. 8 Ch. 495. (2) Law Rep. 8 Ch. 497.
(3) Law Rep. 8 Ch. 498.

means of his own to make payment. By taking from him bills at short dates, with large discount and enormous interest, he was kept under a perpetual pressure, which fell upon him as often as his bills might arrive at maturity. He must either be made bankrupt, or be forced to take up money elsewhere in the market (a process which in such a case would be only shifting the burden from one shoulder to another, and in no way alleviating it), or he must renew with the original creditor, in which case the accumulations of the debt would be rapid and enormous. In the present case this was actually done, . . . at a rate which, if repeated at like intervals, would have about doubled the debt in the course of every year."

In the case before me, if the Defendant were allowed to retain all that he claims to be entitled to, he would have succeeded in as sweeping an operation in proportion to the size of the transaction as the defendant failed to support in *Earl of Aylesford* v. *Morris* (1), for he would be receiving £940 per annum on loans to the amount of £900. Still it does not follow, because the transactions may have been most usurious, that they ought to be set aside, or that the Defendant ought to be deprived of the bargain into which he may have led a foolish and improvident young man, provided it really was a bargain understood by both parties, and entered into under such circumstances as to shew mere folly and extravagance on the one side, and mere usury on the other, and, if I find that the decisions do not warrant me in interfering, I must not interfere. Some of the cases cited for the Defendant are strong against interference in cases of this kind, or at least in cases with some strong features of resemblance. One case was cited which is not to be found in the reports (*Bennett* v. *Bennett*, M. R., Dec. 9, 1876). I had no statement of the facts of the case, but only a shorthand writer's note of part of the judgment. It was an administration suit, and a claim to interest at the rate of £60 per cent. on some bills of exchange was disputed. The Master of the Rolls said: "A man may agree to pay £100 per cent. if he likes." This, of course, cannot be disputed since the repeal of the Usury Acts, but it has been frequently held that the repeal of the Usury Acts has not affected the jurisdiction of the Court of Chancery to

(1) Law Rep. 8 Ch. 484.

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give protection in the case of sales of reversions by persons under pressure: *O'Rorke* v. *Bolingbroke* (1); *Miller* v. *Cook* (2); *Tyler* v. *Yates* (3); and *Howley* v. *Cook* (4); and I apprehend that, if in any case the facts are such that a Court of Equity would have interfered before the repeal of the Usury Acts, it will still interfere, except so far as the objections are founded upon usury alone. Another case relied upon by the Defendant was *Webster* v. *Cook* (5), in which, where a person of full age had agreed to pay £5 per cent. per month on a sum of £400 advanced, the Court refused to interfere. Lord *Chelmsford*, L.C., said (6): "The interest exacted by the defendant is certainly of an excessive kind, and is calculated to create a prejudice against him. But the plaintiff is not a young man, and is fully capable of taking care of himself. He knew that the defendant was a money lender, and he himself states that he had had dealings with the defendant for four years previously, and, if the plaintiff chooses to enter into an agreement of this kind, in which he can impute no fraud or unfair dealing, I do not see what right equity can have to interfere with the transaction, although it may be regarded with no favour." I can, however, find no case which decides that the interference of the Court is limited to cases in which the dealings have been with expectant heirs or reversioners, or to cases in which the dealing has been one in relation to the expectancy; and I gather from the expressions used in several of the cases, that if the transactions are such as to shew that the money lender has throughout been unconscientiously trading upon the weaknesses of the borrower, commencing operations with him during his minority, charging him usurious interest, and endeavouring to entangle him more and more in indebtedness, not as a fair matter of business, but looking to the chances of extorting money from others interested in the debtor, especially if there be any unfair dealing in the course of the transactions which are before the Court, the Court will so far restrain the transaction as to compel the money lender to be satisfied with the sums advanced and fair interest for them. The real question in every case seems to me

(1) 2 App. Cas. 814.
(2) Law Rep. 10 Eq. 641.
(3) Ibid. 11 Eq. 265.
(4) Ir. Rep. 8 Eq. 570.
(5) Law Rep. 2 Ch. 542.
(6) Ibid. 548.

to be the same as that which arose in the case of expectant heirs and reversioners before the special doctrine in their favour was established—that is to say, whether the dealings have been fair, and whether undue advantage has been taken by the money lender of the weakness or necessities of the person raising the money. Sometimes extreme old age has been unduly taken advantage of, and the transaction set aside. Sometimes great distress. Sometimes infancy has been imposed upon, and transactions, though ratified at the full age, have been set aside because of the original vice with which they were tainted. In every case the Court has to look at all the circumstances. In some cases may result the conclusion that there exists mere inadequacy of price, or exorbitance of interest charged, in which case the transaction will not be interfered with. But in others, taking the whole history together, it may present so many features of unconscientiousness, extortion, and unfair dealing on the one side and weakness on the other, as to compel the Court to exercise its equitable jurisdiction, at all events so far as to restrain the profits of the money lender within fair and reasonable bounds. Lord *Thurlow*, in *Gwynne* v. *Heaton* (1), in speaking of the case of expectant heirs, says: "There is a policy in justice protecting the person who has the expectancy, and reducing him to the situation of an infant against the effect of his own conduct. . . . The heir of a family, dealing for an expectancy in that family, shall be distinguished from ordinary cases, and an unconscionable bargain made with him shall not only be looked upon as oppressive in the particular instance, and therefore avoided, but as pernicious in principle and therefore repressed." This by no means says that if one who is not an expectant heir, and whose transactions with a professional money lender commence during infancy, is afterwards led on into hopeless indebtedness by oppressive and unconscientious bargains in a series of transactions, he is not to be protected by the Court. On the contrary, it rather assumes that he would be entitled to protection, though not an expectant heir. In *Beynon* v. *Cook* (2), a young man of twenty-six, wholly without means, but entitled to a reversion on the death of his mother, applied to the defendant, a money lender, who advanced £85 on a note for £100, payable at six months, and a charge of £100 on his reversionary estate of

(1) 1 Bro. C. C. 1, 9. (2) Law Rep. 10 Ch. 389.

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£600, and, in case of default in payment of the note, the defendant was to realize the charge and pay himself the £100 and interest at £5 per cent. per month. This transaction came before the present Master of the Rolls, who made a decree for redemption on payment of the £85 advanced and interest at £5 per cent., on the ground that the plaintiff was an expectant heir and the bargain a hard and unreasonable one. That case being one of an expectant heir, is, of course, no authority for interfering in the present case. But I cannot help thinking that the present case is one in which Equity ought equally to interfere. The Plaintiff was a minor. He was induced by a circular, sent out to persons whose names were in the Peerage, and so sent merely because their names were in the Peerage, to borrow money of the Defendant. The Defendant never intended to deal with the Plaintiff as a real matter of business between him and the Plaintiff, looking to his means, present or future. The Defendant throughout intended to work upon the weakness of the Plaintiff and the fears of those belonging to him, his main reliance being upon the power or hope of extorting money from the Plaintiff's father as soon as the Plaintiff broke down in the payment of cent. per cent. or more. The interest was enormous. The Defendant took advantage of a mere mistake of the Plaintiff, and pocketed large sums to which he was not entitled by any bargain approximately explained to or understood by the Plaintiff. The original bargain was made during minority. The whole conduct of the Defendant indicates that he was from the first unconscientiously inviting the Plaintiff into his debt while a minor, and keeping him there more and more deeply entangled by unfair dealing with regard to the renewals of the first and subsequent notes, in reliance, not upon the solvency of the Plaintiff, or upon his present or probable means of payment, but throughout intending to put pressure upon his father, and relying primarily upon that as affording the chance of being paid his loans and the usurious interest upon them, though also not without an eye to the possibility of being reimbursed, in case of the father's death, out of such expectations as most young lords, sons of the owners of large estates, have upon their fathers' deaths.

Much stress was laid by Mr. *Cookson*, in his able argument for the Defendant, on the fact that the statement of claim contained

no allegation of fraud. I think this immaterial. The Defendant in his defence shews that he understood the statement of claim as alleging facts quite sufficient to throw him on his defence against a charge of unfair dealing. In paragraph 9 he says: "The Defendant denies that he in any manner deceived or misled the Plaintiff, who was well aware of and understood his position, and the terms upon which the Defendant agreed to make advances, and which were accepted by the Plaintiff." Issue is taken upon this allegation, as well as upon the rest of the defence. I am of opinion that it is not supported by the facts. I cannot think that such transactions as those disclosed in the present case, mischievous as they are to society and accompanied with such features of unfairness and extortion, ought to be allowed to result in exorbitant gains to Mr. *Snelling*, or any other money lender; nor do I entertain any doubt that, upon the general principles of Equity, which lay it down that unfair and unconscionable dealings with a person whose position renders him too weak to resist rapacity, and avarice, and unfair dealing, are within the jurisdiction of the Court, and ought to be repressed, I ought to make the decree prayed for in the statement of claim.

I shall not make any order as to the first note different from that which I make as to the others, because I do not find that the Plaintiff relies upon the *Infants' Relief Act* in his statement of claim. I think that the notes ought to stand only as a security for the £900 actually advanced, and £5 per cent. interest from the dates of the advances, the Plaintiff of course having credit in the account for £420, or whatever may be the amount of the excess over the £900 advanced, out of the £900 paid into Court, except so far as it may be required for the payment of the £5 per cent. interest. The balance to be repaid to the Plaintiff.

And, inasmuch as the terms which I think proper were offered on the 8th of September, 1879, I order the costs of the action to be paid by the Defendant.

Solicitors for Plaintiff: *Talbot & Tasker.*
Solicitor for Defendant: *James Davis.*

END OF VOL XV.

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ADMINISTRATION—*Direction to employ Assets in Trade—Executor or Trustee carrying on Trade—Defaulting Executor or Trustee—Trade Creditors—Lien—Indemnity—Practice—Administration Action—Creditor's Claim—Petition or Summons.*] Where a trader has by his will directed his executor or trustee to carry on his trade and to employ a specific portion of the trust estate for the purpose, the rule is that, though the executor or trustee is personally liable for debts incurred by him in carrying on the trade pursuant to the will, he has the right to resort for his indemnity to the specific assets so directed to be employed, but no further; and, consequently, the creditors of the trade are entitled to stand in the place of the executor and trustee, and to claim the benefit of that right so as to obtain payment of their debts: but the rule does not apply where the executor or trustee is in default to the specific trust estate devoted to the trade: in such a case, the defaulting executor or trustee not being himself entitled to an indemnity except upon terms of making good his default, the creditors are in no better position, and are therefore not entitled to have their debts paid out of the specific assets unless the default is made good. *In re* JOHNSON. SHEARMAN *v.* ROBINSON - - - 548

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2. —— *Enjoyment in Specie — Bequest of Short Leaseholds—Power to retain Investments.*] A testator gave several leasehold houses held upon short terms to trustees to pay the income to his wife for life, and then to his grandchildren, and he gave his trustees, one of whom was his wife, power to retain any portions of his property in the same state in which it should be at his decease, or to sell and convert the same as they should in their absolute discretion think fit.—*Held*, that the special power to retain existing investments took the case out of the general rule as to conversion of perishable property, and that the trustees were at liberty to retain the short leaseholds and any other investments held by the testator for such period as they should think fit. GRAY *v.* SIGGERS - - - - 74

ADMINISTRATION ACTION—Assignment to the Crown - - - - 67
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See Extradition Act.
ATTESTATION—Bill of sale - - 42
See Bill of Sale.
—— Will—Next of kin - - - 594
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BANKRUPTCY — *Act of Bankruptcy — Debtor's Summons—Neglect to pay—Payment prevented by act of Creditor—Bankruptcy Petition by Creditor before Expiration of Time limited by Summons—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 6, *sub-s.* 6.] After the service of a debtor's summons, and before the expiration of the time limited for payment of the debt, the summoning creditor presented a bankruptcy petition against the debtor, founded on the same debt, but on an alleged prior act of bankruptcy. The debt was not paid within the time limited, and the creditor then presented a second petition founded on the alleged neglect of the debtor to pay the debt according to the requirements of the summons:—*Held*, that the mere fact of the pendency of the first petition was not a sufficient reason for saying that the debtor had been prevented from paying the debt by the act of the petitioning creditor, and that, therefore, there had been no neglect to pay and no act of bankruptcy; but that to resist adjudication on the second petition the debtor must prove as a matter of fact that the pendency of the first petition had prevented him from paying the debt. *Ex parte Musgrove* (3 M. D. & D. 386) considered. *Ex parte* Greener. *In re* Greener - - C. A. 457

2. —— *Act of Bankruptcy—Proof of Service of Debtor's Summons—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 8—*Bankruptcy Rules*, 1870, *r.* 38—*Illegal Contract—Wagering Transaction—"Differences" on Stock Exchange—Broker and Principal.*] A debtor's summons and a bankruptcy petition founded upon the non-compliance with it, are entirely distinct litigations, and the evidence taken upon the one cannot be used upon the other unless previous notice has been given of the intention to use it. Therefore, upon the hearing of a bankruptcy petition founded upon the debtor's non-compliance with a debtor's summons the service of the summons must be strictly proved, even though the debtor has, in an affidavit previously made by him upon an application to dismiss the summons, admitted that the summons has been served upon him.—Such an affidavit cannot be used upon the hearing of the petition, unless previous notice has been given of the intention to use it.—Where a person desiring to speculate on the *Stock Exchange* has instructed a broker to buy and sell stocks, with the intention that he should only receive or pay "differences," and has authorized the broker to pay any losses for him, the broker is entitled to recover any sums which he has so paid for the principal, even though he has not entered into separate contracts on his behalf, but has appropriated to him parts of larger amounts of stock which he (the broker) has bought as a principal with a view of dividing them among different clients for whom he has been instructed to buy.—*Robinson* v. *Mollett* (Law Rep. 7 H. L. 802) distinguished. *Ex parte* Rogers. *In re* Rogers - - - C. A. 207

3. —— *Annulling Adjudication on Equitable Grounds—Creditor's Suit—Bankruptcy Act*, 1869, *s.* 8—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.] A judgment creditor is not entitled, after the expiration of twelve years without payment of interest or acknowledgment of his right, to obtain an adjudication in bankruptcy against the debtor, though within the twelve years a suggestion has been entered on the roll under the *Common Law Procedure Act*, 1852, s. 129. *Ex parte* Tynte. *In re* Tynte - 125

4. —— *Appeal—Adjudication of Bankruptcy—Application to annul—Parties to be served—Time—Rules of Court*, 1875, *Order* LVIII., *rr.* 9, 15.] Notice of an appeal from the refusal to annul an adjudication of bankruptcy must be served on the trustee in the bankruptcy as well as on the petitioning creditor.—And if notice of the appeal is served on the petitioning creditor in time, but is not served in time on the trustee, the appeal must be dismissed.—The time for appealing will not be extended in such a case. *Ex parte* Ward. *In re* Ward - - C. A. 292

5. —— *Disclaimer—Lease of Bankrupt—Equitable Mortgagee—Assignment by Trustee—Right of Trustee to Indemnity—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 23.] When the trustee of a bankrupt desires to disclaim a lease which the bankrupt has deposited by way of equitable mortgage, he will not be allowed to do so to the prejudice of the mortgagee, but if he assigns the lease to the mortgagee, the latter must covenant to indemnify him against liability under the lease.—*Wilkins* v. *Fry* (1 Mer. 244) considered. *Ex parte* Buxton. *In re* Müller - - C. A. 289

6. —— *Liquidation Petition—Mortgagee in Possession — Injunction — Jurisdiction — Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 12, 13, 65, 72—*Bankruptcy Rules*, 1870, *r.* 260.] When at the time of the filing of a liquidation petition the grantee of a bill of sale given by the debtor is in actual uncontrolled possession of the property comprised in the deed, the Court ought not to interfere by injunction with the exercise of the grantee's legal rights upon the mere suggestion that, if an injunction is granted, it is possible that the trustee in the liquidation, when appointed, may be able to raise a case for impeaching the validity of the deed.—In order to justify such an interference the applicant for the injunction must at least swear to his belief of some facts which, if established, would render the deed invalid as

BANKRUPTCY—*continued.*
against the trustee in the liquidation. *Ex parte* BAYLY. *In re* HART - - - C. A. 223

7. —— *Proof—Principal and Surety—Compulsory or Voluntary Payment by Surety—Guarantie of Bill of Exchange—Payments by Guarantor to Holder—Interest—Practice—Appeal—Time—Notice by Respondent—Rules of Court*, 1875, *Order* LVIII., *rr.* 6. 9, 15.] It being proved to be the common and almost invariable practice of bill brokers in the city of *London*, not to indorse each bill of exchange which they have discounted for a customer when they re-discount it with their bankers, but to give to the bankers a general guarantie for all bills which they re-discount with them:—*Held*, that when an accommodation bill is drawn and accepted for the purpose of raising money for the drawer and the acceptor, the drawer in discounting the bill with bill brokers in the city of *London* has an implied authority from the acceptor to deal with them in the ordinary course of their business, and, consequently, that the bill brokers have an implied authority from the acceptor to make themselves liable on the bill under their guarantie to their bankers, and are, in the event of the bankruptcy of the acceptor, entitled to prove against his estate for what they have paid to the bankers in respect of the bill under their guarantie:—*Held*, also, that the bill brokers are entitled to prove against the estate of the acceptor for interest upon the amount which they have paid under their guarantie. *Petre* v. *Duncombe* (2 Lown. Max. & Poll. Pr. Cas. 107) and *Hitchman* v. *Stewart* (3 Drew. 271) approved and followed.—A notice given by the Respondent to an appeal under rule 6 of Order LVIII. of the Rules of Court, 1875, need not be given within the time limited by rule 15. *Ex parte* BISHOP. *In re* FOX, WALKER, & Co. - - C. A. 400

8. —— *Secured Creditor — Elegit — Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 12, 16 (*sub-s.* 5), 87.] Under a writ of *elegit* the sheriff is entitled to seize the debtor's goods at once, before the holding of the inquisition, and from the time of the seizure the creditor becomes a secured creditor within the meaning of sect. 16 (sub-sect. 5) of the *Bankruptcy Act*, 1869.—Sect. 87 has no application to a seizure of goods under an *elegit*.—Leave given to appeal to the House of Lords. *Ex parte* ABBOTT. *In re* GOURLAY - - - - - C. A. 447

—— Mortgagor—Acknowledgment by - 339
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—— Trustee—Action to set aside deed—Assignment to a purchaser - - 426
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BANKRUPTCY RULES, 1870, r. 38 - 207
See BANKRUPTCY. 2.

—— r. 260 - - - - - 223
See BANKRUPTCY. 6.

BILL OF SALE—*Registration—Description of Grantor—Setting forth of Consideration—Attestation—Explanation to Grantor—Duty of Solicitor—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 8, 10.] Sect. 8 of the *Bills of Sale Act*, 1878, requires that the consideration for a bill of sale should be truly stated in it, as it would properly have been stated independently of the Act. But it does not require that a collateral agreement between the grantor and grantee as to the application of the consideration should be set forth.—*Per Baggallay*, L.J., *Ex parte Carter* (12 Ch. D. 908) questioned.—Sect. 10, though it requires that the attestation clause shall state that the effect of the bill of sale has before its execution been explained by the attesting solicitor to the grantor, does not require that any such explanation should have in fact been given.—*Semble*, that a solicitor who stated in the attestation clause to a bill of sale that he had explained the effect of it to the grantor when he had not in fact done so, would be liable to civil and penal consequences. *Ex parte* NATIONAL MERCANTILE BANK. *In re* HAYNES - - - - C. A. 42

BONA VACANTIA—Claim against Crown by next of kin - - - - 67
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BOND—To appoint by will - - - 294
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BOOTY OF WAR—*Royal Warrant—Grant of Booty of War to Secretary of State "in trust" to distribute amongst Persons found entitled—Trust or Agency—Liability to account.*] Her Majesty by Royal warrant "granted" booty of war to the Secretary of State for *India* in Council "in trust" to distribute amongst the persons found entitled to share it by the decree of the Judge of the Court of Admiralty, to whom the matter had been referred by the Sovereign for that purpose, with a direction that doubts should be finally determined by the Secretary of State unless Her Majesty should otherwise order.—An action having been brought against the Secretary of State for *India* in Council by *K.*, on behalf of himself and all the other parties entitled, alleging that a portion only of the fund had been distributed, and claiming an account and the distribution of the residue:—*Held* (reversing the decision of *Hall*, V.C.), that the warrant did not operate as a transfer of property or create a trust; and that the Defendant, being merely the agent of the Sovereign to distribute the fund, was not liable to account to any of the parties found entitled. KINLOCK *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL - - - - C. A. 1

CASES:—*Abinger* (*Lord*) v. *Ashton* (Law Rep. 17 Eq. 358) explained - - 113
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—— *Arthur Average Association, In re* (Law Rep. 10 Ch. 542), doubted - 247
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—— *Attree* v. *Hawe* (9 Ch. D. 357) distinguished
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—— *Buckton* v. *Hay* (11 Ch. D. 645) considered
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—— *Coffin* v. *Cooper* (2 Dr. & Sm. 365) followed
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—— *Crawshaw* v. *Crawshaw* (14 Ch. D. 817) distinguished - - - - 635
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—— *Crossley* v. *City of Glasgow Life Assurance Company* (4 Ch. D. 421) overruled on one point - - - - 169
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—— *Emma Silver Mining Company* v. *Grant* (11 Ch. D. 918) explained - - 475
See Practice. 5.

—— *Espin* v. *Pemberton* (3 De G. & J. 547) considered - - - - 639
See Mortgage. 2.

—— *Festing* v. *Allen* (12 M. & W. 279) commented on - - - - 59
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—— *Gale* v. *Gale* (21 Beav. 340) followed 481
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—— *Ginesi* v. *Cooper & Company* (14 Ch. D. 596) disapproved - - - 306
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—— *Hearle* v. *Greenbank* (3 Atk. 695) commented on - - - - 228
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—— *Hitchman* v. *Stewart* (3 Drew. 371) followed
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—— *Humble* v. *Shore* (7 Hare, 247) followed 635
See Will. 6.

—— *Lightfoot* v. *Burstall* (1 H. & M. 546) followed - - - - 635
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—— *Michael's Trusts, In re* (46 L. J. (Ch.) 651), considered - - - - 610
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—— *Musgrove, Ex parte* (3 M. D. & D. 386), considered - - - - 457
See Bankruptcy. 1.

—— *Myers* v. *Perigall* (2 D. M. & G. 599) distinguished - - - - 363
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—— *Osborne and Rowlett* (13 Ch. D. 774) doubted
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—— *Petre* v. *Duncombe* (2 Lown. Max. & Poll. Pr. Cas. 107) followed - 400
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—— *Phillips* v. *Phillips* (4 D. F. & J. 208) considered - - - - 639
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—— *Pike* v. *Fitzgibbon* (14 Ch. D. 857) followed
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—— *Reg.* v. *Wycombe Railway Company* (Law Rep. 2 Q. B. 310) followed - 330
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—— *Robinson* v. *Mollett* (Law Rep. 7 H. L. 802) distinguished - - - 207
See Bankruptcy. 2.

—— *Rolland* v. *Hart* (Law Rep. 6 Ch. 678) considered - - - - 639
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—— *Rollins* v. *Hinks* (Law Rep. 13 Eq. 355) considered - - - - 514
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—— *Saner* v. *Bilton* (11 Ch. D. 416) approved
See Practice. 2. [287

—— *Sykes* v. *Beadon* (11 Ch. D. 170) disapproved
See Company. 2. [247

—— *Veal* v. *Veal* (27 Beav. 503) followed 651
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—— *Wilkins* v. *Fry* (1 Mer. 244) considered 289
See Bankruptcy. 5.

—— *Wilson* v. *Wilson* (4 Jur. (N.S.) 1076) considered - - - - 610
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CHAMBERS—Practice in—Order under Trustee Act - - - - - 317
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CHAMPERTY—*Bankrupt Law—Commencement of an Action by Trustee in Bankruptcy—Assignment by Trustee of the Subject-Matter of the Action—Right of Assignee to continue the Action—Bankruptcy Act*, 1869, *ss.* 4, 17, 25—*Rules of Court*, 1875, *Order L., r.* 3.] The trustee in bankruptcy of a man who had conveyed away some real property absolutely, commenced an action against the grantee to have it declared that the conveyance was a mortgage, and that the deed ought to stand as a security only for the money advanced. The action had proceeded no further than the issue of the writ, when the trustee sold and assigned the subject-matter of the action to a purchaser for value:—*Held*, by *Bacon*, V.C., and by the Court of Appeal, that the assignee from the trustee in bankruptcy was entitled to continue the action.—Whether such a right could not have been assigned by the grantor himself, *quære*.
Seear *v.* Lawson - - - C. A. 426

CHARGE—Local Government Act, 1878 - 378
See Local Government Act.

—— Married woman's separate estate - 665
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—— Police rates—Interest in land—Mortmain
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CHARITY—*Mortmain—Bequest of Share in Partnership Property—Land held for Partnership Purposes—9 Geo.* 2, *c.* 36.] A testator, who was a partner in a mercantile firm, gave the proceeds of the sale of his share of certain real estate which was held as partnership property to charitable uses:—*Held* (affirming the decision of *Malins*, V.C.), that the interest of the testator in the partnership property, so far as it comprised moneys arising from the sale of the real estate, was an interest in land under the *Mortmain Act*, and that the bequest of it was void.—*Brook* v. *Badley* (Law Rep. 3 Ch. 672) followed.—*Myers* v. *Perigall* (2 D. M. & G. 599) and *Attree* v. *Hawe* (9 Ch. D. 337) distinguished. Ashworth *v.* Munn [C. A. 363

2. —— *Mortmain—Police Rates, Charge on—Interest in Land—Pure or Impure Personalty—* 2 & 3 *Vict. c.* 93—3 & 4 *Vict. c.* 88; 7 & 8 *Vict. c.* 33.] A sum of money borrowed by justices of the peace under and for the purposes of the Acts 2 & 3 Vict. c. 93 and 3 & 4 Vict. c. 88, and charged by them, by a bond or instrument of

CHARITY—*continued.*

charge, upon the police rates of a division of a county, is, having regard to the Act 7 & 8 Vict. c. 73, pure personalty. *In re* HARRIS. JACSON *v.* GOVERNORS OF QUEEN ANNE'S BOUNTY - 561

CHEQUE—*Donatio mortis causâ* - - 651
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COMPANY—*Cost-book Mine—Fraudulent Transfer—Stannaries Act*, 1869 (32 & 33 *Vict. c.* 19), *ss* 25, 35—*Acceptance of Transferee by Company—Winding-up—Past Member.*] The holder of shares in a cost-book mining company transferred all his shares to a transferee for a nominal consideration. The company registered the transfer and made calls on the transferee, and then discovered that the transferee was a poor man and could not pay anything. They brought an action and recovered judgment against him, and afterwards forfeited his shares for non-payment of calls. More than two years after the transfer an order was made for winding up the company:—*Held*, that, assuming that the transfer was fraudulent under the 35th section of the *Stannaries Act*, 1869 (32 & 33 Vict. c. 19), the transfer having been acted on and the shares forfeited by the company, with knowledge of the insolvency of the transferee, it could not be set aside in the winding-up, and the name of the transferor could not be put on the list of contributories.—A shareholder in a cost-book mine who has ceased to be a shareholder more than two years before the order for winding up, cannot be put on the list of contributories as a past member, although he had not so ceased for two years before the mine ceased to be worked. *In re* WHEAL UNITY WOOD MINING COMPANY. CHYNOWETH'S CASE - C. A. 13

2. —— *Investment Trust — Association of more than Twenty Persons for Gain—Companies Act*, 1862, s. 4.] Shares in a number of submarine telegraph companies of the aggregate nominal amount of £400,000 were purchased by subscription and vested in trustees. Each subscriber received for every £90 subscribed a certificate for the nominal amount of £100, and a deferred coupon for one 4200th part of the funds, the number of certificates being 4200. The trusts of the funds were declared by a deed between the trustees and a covenantee on behalf of the certificate holders. The trustees were to apply the income of the shares in payment of interest at £6 per cent. on the nominal amounts of the certificates, and apply the surplus in redeeming the certificates. It was provided that the trustees might at their discretion sell any of the shares if they could be sold at

COMPANY—*continued.*

a premium of not less than 30 per cent. over the price given for them, but that, except in that case, none of them should be sold unless at a meeting of the trustees it was unanimously resolved to be for the interest of the certificate holders that shares to be specified in the resolution should be sold. The proceeds of every sale were to be applied in the redemption of certificates, unless the trustees by an unanimous resolution, confirmed by a meeting of certificate holders, determined to reinvest in submarine telegraph shares. Meetings of the certificate holders were to be held for the purpose of receiving reports from the trustees on the affairs of the trust, of appointing auditors, and of appointing new trustees in the place of trustees who should die, retire, or become incapable to act. After all the certificates had been redeemed the funds in hand were to be divided among the holders of the deferred coupons. The holders of the certificates were more than twenty in number:—*Held*, by the Master of the Rolls, that this was an association of more than twenty persons formed for the purpose of carrying on business having for its object the acquisition of gain within the *Companies Act*, 1862, s. 4; that not being registered it was illegal; and that a judgment ought to be given for the Plaintiff in an action by a certificate holder for winding it up and distributing the funds among the certificate holders.—*Held*, by the Court of Appeal,—1. That the certificate holders did not form an association within the meaning of the *Companies Act*, 1862, s. 4.—2. That the object of the deed of settlement was not to authorize the carrying on of a business within the meaning of the section, but to provide for the management of a trust fund, and that even if the powers of selling the shares and reinvesting the proceeds could be considered to authorize the carrying on of a business, these provisions being merely subsidiary, and not forming any substantial part of the object, would not bring the case within the Act.—3. That, supposing the deed to authorize the carrying on of a business, such business was carried on only by the trustees, who carried it on as trustees, and not as agents or directors, and that as they were fewer than twenty, the case was not within the Act.—*Sykes* v. *Beadon* (11 Ch. D. 170) disapproved.—*In re Arthur Average Association* (Law Rep. 10 Ch. 542) doubted. SMITH *v.* ANDERSON - - - C. A. 247

3. —— *Winding-up — Contributories — Shareholders—Policy-holders — Insurance Company — Calls—Primary Liability.*] By the constitution of an insurance company (unlimited) the shareholders were to receive 6 per cent. interest on the amounts paid up by them, and the profits were then to be divided, one-fourth to go to the shareholders and three-fourths to the policy-holders.—*Held*, that, though the policy-holders were contributories, they could not be called upon to contribute until the shareholders had been exhausted. *In re* ALBION LIFE ASSURANCE SOCIETY - 79

4. —— *Winding-up—Contributory—Fraudulent Prospectus — Rescission by Contributory of Contract to take Shares—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 38.] A shareholder in a company who has been induced to apply for shares by fraudulent misrepresentations contained in the

COMPANY—*continued.*

promoters' prospectus, is not entitled after winding-up to rescind his contract to take the shares, even if the assets in the hands of the liquidators are sufficient to pay in full the whole liabilities of the company together with the costs of the winding-up.—The liabilities of contributories under *Companies Act*, 1862, s. 38, considered. *In re* Hull and County Bank. Burgess's Case 507

5. —— *Winding-up—Costs—Action commenced before Winding-up by Shareholders for the Benefit of the Company—Jurisdiction — Companies Act*, 1862, ss. 38, *sub-s.* 7, 110.] An action was commenced by two shareholders in a company, on behalf of themselves and all other shareholders, to impeach a contract made with the company on the ground of fraud. Before the trial the company was wound up, and the Plaintiffs did not obtain leave in the winding-up to carry on the action. At the trial the action was dismissed by consent without costs:—*Held*, that the Court had no jurisdiction to order the Plaintiffs' costs to be paid out of the assets in the winding-up, although the Judge who heard the action certified that the action was for the benefit of the company, and gave liberty to the Plaintiffs to apply in the liquidation for their costs. *In re* Hull Central Drapery Company - - - C. A. 326

6. —— *Winding-up—Debentures—Charge on Real and Personal Estate of Company—Uncalled Capital—Right of Proof—Commencement of Winding-up.*] A company formed for the purchase and management of land, and which was empowered by articles to borrow money for the purposes of the company provided that the amount borrowed should not at any time exceed the amount of the unpaid subscribed capital, had issued debentures whereby they bound "themselves and their successors and their real and personal estate" for payment of the sums advanced, with a proviso that the holders of the debentures should be entitled to be paid the principal and interest secured to them respectively *pari passu*. The company was in liquidation, a provisional liquidator having been appointed on the petition of the company, and a resolution having been subsequently passed for a voluntary winding-up, which was continued under supervision. On a claim by debenture holders to be entitled to a primary charge on the company's property, including the uncalled capital:—*Held*, that the debentures were a charge on the real and personal estate of the company as it existed at the commencement of the winding-up, but not including the then uncalled capital:—*Held*, also, that the debenture holders, so far as they might be unable to obtain payment in full out of the property comprised in their charge, were at liberty to prove with the other creditors against the general assets:—*Held*, also, that the winding-up must be taken to have commenced at the date of the appointment of the provisional liquidator. *In re* Colonial Trusts Corporation. *Ex parte* Bradshaw - - - - - - 465

7. —— *Winding-up—Power of Liquidator to continue Business of Company—Fresh Contracts —Companies Act*, 1862, *s.* 95.] In order to give the Court jurisdiction to sanction a contract by the liquidator in carrying on the business of the

COMPANY—*continued.*

company under the 95th section of the *Companies Act*, 1862, it must be shewn that its object is the beneficial winding-up of the company, and that it is highly expedient for that purpose. Therefore, where the object of a proposed business contract was to facilitate the reconstruction of the company:—*Held* (reversing the decision of *Malins*, V.C.), that the Court had no jurisdiction to sanction the contract. *In re* Wreck Recovery and Salvage Company - - - - C. A. 353

8. —— *Practice — Voluntary Winding-up — Action against Director—Summons for Examination of Director after Interrogatories fully answered —Companies Act*, 1862, *ss.* 115, 138.] A voluntary liquidator who applies to the Court under the 138th section of the *Companies Act*, 1862, for an order under the 115th section to examine a person in respect of the affairs of the company is not entitled as of right to the order, but must satisfy the Court that it will be just and beneficial for the purposes of the winding-up.—Where a voluntary liquidator has brought an action on behalf of the company against an officer of the company, and has exhibited interrogatories which have been fully answered by the Defendant, he will not be entitled to an order under the 115th section for the examination of the Defendant unless he satisfy the Court that, notwithstanding the interrogatories already exhibited, he has a strong case for a further examination. *In re* Metropolitan Bank. Heiron's Case - - - - C. A. 139

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See Bill of Sale.

—— Marriage—Next of kin - - 580
See Settlement. 1.

CONSOLIDATED ORDER XXXV., r. 1. - 317
See Trustee Acts.

CONSTRUCTIVE NOTICE - - - 639
See Mortgage. 2.

CONTINGENT REMAINDERS - - - 59
See Will. 2.

CONTRACT—For shares - - - 507
See Company. 4.

—— Illegality of - - - - 207
See Bankruptcy. 2.

CONTRIBUTORY - - - 79, 507
See Company. 3, 4.

CONVERSION—Land subject to power 481, 491
See Power. 2, 3.

—— Perishable property - - - 74
See Administration. 2.

—— Partnership property—Mortmain - 363
See Charity. 1.

COPYHOLDS—*Encroachment on Waste by Copyhold Tenant—Minerals—Mining without Consent of Copyholder — Measure of Damages.*] A copyhold was surrendered in 1809 to a trustee for the Crown for military purposes. In 1808 the then

COPYHOLDS—*cantinued.*

lord of the manor had granted to *M.*, the governor of a neighbouring fort, a license to enclose a portion of the waste adjoining the copyhold, and occupy it at a yearly rent during his life, if he so long continued governor, which he ceased to be in 1811. Nothing further was shewn as to the title to the land included in the license except that at the commencement of this action in 1874, the Crown had been in possession of it as inclosed ground, as well as of the original copyhold, for more than forty years. Since 1811, there had been repeated admittances of trustees for the Crown to the original copyhold, in which it was described by metes and bounds not including the close *L.* comprised in the license. In 1874 the lord of the manor, without the consent of the Crown, granted a license to get coprolites out of close *L.* at a royalty, and received £222 for royalties. The Crown brought an action for an injunction and damages. *Fry*, J., held that close *L.* had become an accretion to the copyhold tenement, and was of copyhold tenure, but the decree only granted an injunction and an inquiry as to damages, without any declaration of the rights of the parties. The Chief Clerk having certified that the damages payable to the Crown were £222, and *Fry*, J., having approved of his finding, the lord appealed on the ground that the damages were excessive. The tenant who held close *L.* under the Crown had separately received full compensation for surface damage, and the land had been restored to its original condition:—*Held*, by the Court of Appeal, that, assuming the doctrine that encroachments made by a lessee enure to the benefit of the landlord to be applicable to encroachments by a copyholder, the application of that doctrine was excluded by the facts that the inclosure of close *L.* having been made by license to the lord was not an encroachment, and that the subsequent admittances did not treat close *L.* as part of the copyhold tenement.—Whether that doctrine does apply to copyholds, *quære.*—*Held*, that the Crown had under the *Statute of Limitations* acquired a freehold title to close *L.*, and that as the coprolites, therefore, belonged to the Crown, the damages were not excessive.—Whether, if close *L.* had been copyhold, a finding which gave to the copyholder by way of damages the whole sum received by the lord for the coprolites could have been sustained, *quære.* ATTORNEY-GENERAL *v.* TOMLINE [C. A. 150

COPYRIGHT — *Infringement of Copyright in Engraving*—8 *Geo.* 2, *c.* 13—7 *Geo.* 3, *c.* 38—17 *Geo.* 3, *c.* 57—*Wood Pattern taken from Engraving—Slander of Title.*] *D.*, the proprietor of a periodical, published with his Christmas number a pattern for wool-work, consisting of the figures in *Millais'* picture "*The Huguenot*," with a different background. The pattern appeared not to have been taken from the original picture, but to have been made by help of a fine engraving published in 1857. The pattern, as usual in patterns of this kind, was a mosaic built up of small coloured squares. *B.*, who was the owner of the copyright in the engraving, but was not owner of the picture, issued a circular: "We give you notice that if you sell, &c., any copy of our subject '*The Huguenot*', without the stamp or imprint of our firm, in whom the sole subsisting copyright exists, that all such unstamped copies are imitations and unlawfully made." *D.* thereupon brought an action against *B.* for damages, and an injunction in respect of the alleged slander of his title. *B.*, by counter-claim claimed an injunction against the sale of the pattern, and penalties in respect of the infringement of his copyright:—*Held*, by *Bacon*, V.C., that the pattern was an infringement of *B.'s* copyright, and that he was entitled to the statutory penalty of 5*s.* for every copy sold by *D.*—*Held*, on appeal, that a pattern of this description was not a copy of the engraving within the meaning of 7 Geo. 3, c. 38, and 17 Geo. 3, c. 57, as it did not copy or imitate anything which constituted the work of the engraver; and that the counter-claim ought, therefore, to have been dismissed:—*Held*, also, that, as the circular might reasonably be understood to allege as a matter of fact that *B.* had such a right to the design, as distinguished from the engraving, of "*The Huguenot*" as to make any reproduction of it in any form an infringement of his right, *D.* could have maintained his action if any appreciable injury to his trade from the circular had been proved. DICKS *v.* BROOKS [C. A. 22

2. —— *Piracy—Importing for Sale—Selling knowingly—Injunction—Costs—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *s.* 17—*Judicature Act*, 1873, *s.* 25, *sub-s.* 8.] The proprietors of an English copyright discovering a piracy by an American firm, sent notice to the agents in *England* of that firm not to distribute the copies complained of, and immediately afterwards brought an action against the agents for an injunction to restrain them from selling or importing for sale such copies in this country. The Defendants in their statement of defence stated that they had not received the copies from *America* until after the service of the writ in the action, and that when they did receive the copies they recognised the infringement of the Plaintiffs' copyright and at once determined not to sell:—*Held*, that the Defendants had, within the terms of the *Copyright Act*, 1842, s. 17, "imported for sale" the copies complained of, and must, therefore, pay the costs of the action.—The offences mentioned in the *Copyright Act*, 1842, s. 17, are, to "import for sale" and to "sell knowingly" foreign piracies of copyright:—*Held*, that a distinction is created by the addition in the statute of the word "knowingly" to the one offence, and therefore that a plaintiff who proceeds in respect of "importing for sale" is not required to give the defendant any notice, but may at once obtain an *ex parte* injunction. If, however, it is intended to take proceedings in respect of "selling knowingly," notice of the nature of the copies complained of should properly be sent to the importer.—Where an action is brought to enforce a legal right, and there is no misconduct on the part of the plaintiff, the Court has no discretion to refuse him costs.—Where a statute creates a new offence and imposes a penalty, the ancillary remedy by injunction may still be claimed. COOPER *v.* WHITTINGHAM - 501

COST-BOOK MINE—Fraudulent transfer of shares *See* COMPANY. 1. [13

COSTS—Claim and counter-claim disallowed—Apportionment - - - 287
See Practice. 2.
—— Legal right—Discretion of Court - 501
See Copyright. 2.
—— Petition without authority - - 557
See Practice. 4.
—— Trusts of settlement—Appointed and unappointed shares - - - 566
See Practice. 3.
—— Winding-up - - - - 326
See Company. 5.
COUNTERCLAIM - - 162, 287, 474, 475
See Practice. 2, 5, 6, 8.
COUSIN—Will—Construction—First and second cousins - - - - 528
See Will. 7.
COVENANT—Not to assign - - - 96
See Specific Performance.

CROWN—*Will—Administration by Executors—Assignment to the Crown—Claim by Next of Kin—Interest payable by the Crown.*] The trustees and executors of a will administered to the property, and upon its being decided in a suit instituted for the purpose that there was an intestacy, and no heir or next of kin being discovered, the trustees assigned the leasehold property to the Solicitor for the Treasury, to be held for the benefit of the Crown. The Plaintiffs, six years afterwards, established their claim as next of kin of the testator, and the Court declared them entitled:—*Held*, that the Crown was bound to pay to the Plaintiffs interest at the rate of 4 per cent. upon all the rents and profits received on account of the personalty, just as if the Crown had administered to the estate. *In re* Gosman - 67

—— Booty of war - - - - 1
See Booty of War.

DAMAGES—Measure of—Mining without consent of tenant - - - - 150
See Copyhold.
—— Sale of land—Specific performance - 215
See Vendor and Purchaser. 2.
DEALING WITH CUSTOMERS—Injunction 306
See Restraint of Trade.
DEBENTURES - - - - 465
See Company. 6.
DEBT—Married woman - - - 87
See Husband and Wife. 2.
—— Payable by instalments—Mortgage—Foreclosure - - - - 93
See Mortgage. 1.
DEBTOR'S SUMMONS - - 207, 457
See Bankruptcy. 1, 2.
DECEASED LUNATIC—Inspection of documents
See Lunatic. 1. [286
DECREE—Notice of - - - 490
See Practice. 9.
DELAY—Vendor of land - - - 122
See Vendor and Purchaser. 1.
DEPOSIT—Policy of life insurance - 169
See Insurance.
DIFFERENCES—Contract for—Stock Exchange
See Bankruptcy. 2. [207
DIRECTOR—Summons for examination - 139
See Company. 8.
DISCLAIMER—Trustee in bankruptcy - 289
See Bankruptcy. 5.
DISCONTINUANCE OF ACTION - - 474
See Practice. 6.
DISTRIBUTIONS, STATUTE OF - - 539
See Will. 4.
DIVERSION OF RIVER - - - 330
See Railway.
DOCUMENTS—Inspection—Lunatic's property
See Lunatic. 1. [286
—— Production of - - - - 120
See Practice. 7.

DONATIO MORTIS CAUSÂ—*Banker's Deposit Note—Bill of Exchange.*] A testator, who held a banker's deposit note for £2700, in his last illness, two days before his death, expressed a wish to give £500, part of the amount, to his wife. At his request a friend filled up a seven days' notice to the bank to withdraw the deposit, and the testator signed it. The friend then took the notice to the bank. The testator afterwards signed a form of cheque, which was on the back of the note, "Pay self or bearer £500." The note was then handed to the wife. The testator died before the expiration of the seven days' notice. The practice of the bank was, when a customer withdrew part of a sum which he had placed on deposit, to give him a fresh note for the balance:—*Held*, that there had not been a valid *donatio mortis causâ* of the £500, inasmuch as the cheque for that amount was not payable till after the testator's death. The testator also, shortly before his death, gave to his wife two bills of exchange, which were payable to himself or order. They did not fall due until after his death. They had not been indorsed by him:—*Held*, that there had been a valid *donatio mortis causâ* of the bills. *Veal* v. *Veal* (27 Beav. 303) followed. *In re* Mead. Austin *v.* Mead - - - - 651

ELEGIT—Secured creditor - - - 447
See Bankruptcy. 8.
ENCROACHMENT—Waste of manor - 150
See Copyhold.
ENGRAVING—Copyright - - - 22
See Copyright. 1.
ENJOYMENT IN SPECIE—Short leaseholds 74
See Administration. 2.
ENUMERATION—Residuary gift - - 594
See Will. 5.
EQUITABLE ESTATE—Partition—Overriding trusts - - - - 165
See Partition.
EVIDENCE—Further evidence - - 165
See Partition.
—— Mistake in settlement - - - 655
See Settlement. 3.
—— Parol trust—Legacy - - - 594
See Will. 5.
EXAMINATION—Director—Winding-up of company - - - - - 139
See Company. 8.

EXCLUSIVE POWER - - - 614
See Settlement. 2.

EXECUTOR—Carrying on trade - - 548
See Administration. 1.

EXPECTANCY—Charge by married woman 665
See Husband and Wife. 1.

—— Mortgage by heir - - - 679
See Mortgage. 3.

EXTRADITION ACT, 1870 (33 & 34 *Vict. c.* 52), *s.* 19—*Offence committed before Surrender—Attachment for Contempt of Court—Collusive Proceedings.*] An attachment issued by the High Court of Justice for disobedience of an order of the Court in a civil action is not an offence within the meaning of the 19th section of the *Extradition Act*, 1870. Therefore, where a party to an action in the Chancery Division was arrested in *Paris* for a crime under the *Extradition Act*, and while in prison in *England* under the warrant was served with an attachment for disobedience to an order in the action:—*Held* (affirming the decision of *Bacon*, V.C.), that the attachment was valid, and that the prisoner was not entitled to his discharge until he had cleared his contempt, although he had been acquitted of the criminal charge. The 19th section of the *Extradition Act* is not confined to political offences, but applies to all criminal charges. If a warrant under the *Extradition Act* is obtained, not for the *bonâ fide* purpose of punishing a person for a crime, but with the indirect object of making him amenable to an attachment in a civil action, the Court will relieve against such an abuse of the process of the Court. Pooley *v.* Whetham - - - C. A. 435

FIDUCIARY RELATION—Husband - 655
See Settlement. 3.

FORECLOSURE - - - - 93
See Mortgage. 1.

FOREIGN CREDITOR - - - 591
See Foreign Suit.

FOREIGN SUIT—*Administration Action—Foreign Creditor—Foreign Court—Injunction.*] Although judgment has been given for the administration of an estate, the Court has no power to restrain a foreign creditor from proceeding in a foreign Court against the administrator; but if judgment were obtained in the foreign Court against the administrator by default, it would only be treated in the administration action as *primâ facie* evidence of the debt. *In re* Boyse. Crofton *v.* Crofton - - - - - 591

FRAUDULENT APPOINTMENT - - 294
See Power. 4.

GOODWILL—Sale of—Injunction against dealing with customers - - - 306
See Restraint of Trade.

GUARANTEE — Bill of exchange — Proof by guarantor in bankruptcy - - 400
See Bankruptcy. 7.

HEIR—Mortgage of expectancy - - 679
See Mortgage. 3.

—— Surviving trustee—Trust for sale - 143
See Vendor and Purchaser. 3.

HOTCHPOT CLAUSE - - - - 539
See Will. 4.

HUSBAND AND WIFE — *Married Woman — Separate Estate—Agreement to charge — Expectancy on Death of Living Person—Parties.*] A married woman can give a valid charge on her expectancy under the will or as one of the next of kin of a living person.—And such a charge will be enforced after that person's death against separate estate bequeathed by his will to the married woman. — *Pike* v. *Fitzgibbon* (14 Ch. D. 837) followed.—To an action to enforce such a charge the trustees of the will are not necessary parties. Flower *v.* Buller - - - - 665

2. —— *Married Woman—Separate Estate—General Engagements—Statute of Limitations.*] Moneys advanced by a stranger in providing necessaries for the support of a married woman, living separate from her husband, are debts binding her separate estate; and, being debts payable out of funds held in trust for her separate use, are not barred by the *Statute of Limitations*. Hodgson *v.* Williamson - - - - 87

ILLEGALITY—Association of more than twenty persons—Registration - - 247
See Company. 2.

—— Contract—Wager - - - 207
See Bankruptcy. 2.

ILLEGITIMATE CHILDREN - - 198
See Will. 3.

IMPLIED REVOCATION—Will - - 594
See Will. 5.

IMPORTING FOR SALE—Copyright - 501
See Copyright. 2.

INDEMNITY—Assignment of mortgage—Trustee in bankruptcy - - - 289
See Bankruptcy. 5.

—— Executor carrying on trade - - 548
See Administration. 1.

INFANT—Execution of power - - 228
See Power. 1.

INFRINGEMENT—Copyright - - 22
See Copyright. 1.

INJUNCTION—Bankruptcy - - - 223
See Bankruptcy. 6.

—— Ceasing to pump water out of mine - 113
See Mine.

—— Slander of title - - - - 514
See Patent.

—— Suit in foreign court - - - 591
See Foreign Suit.

INSPECTION OF DOCUMENTS—Deceased lunatic
See Lunatic. 1. [286

INSTALMENTS—Purchase-money—Vendor's lien
See Vendor and Purchaser. 4. [649

INSURANCE—*Life Policy—Equitable Mortgage by Deposit—Death of Assured—Dispensing with Legal Personal Representative—Payment to Equitable Owner—Interest—3 & 4 Will. 4, c. 42, ss. 28, 29—Chancery Improvement Act*, 1852 (15 & 16 *Vict. c.* 86), *s.* 44.] In 1847 *A.* deposited a policy on his own life with *B.* as security for an advance of money, and died in 1874 insolvent, and no administration was taken out to his estate. In 1875

INSURANCE—*continued.*
B. proved *A.'s* death to the satisfaction of the assurance company, and demanded payment of the policy moneys, which were insufficient to pay his debt, but the company refused to pay him without the consent of the legal personal representative of *A.*—In 1878 *B.* died, and on action brought by his executors against the company claiming a declaration that they were entitled to the policy moneys, and payment with interest from the time when the demand of payment was made, *Jessel*, M.R., 1, held that the company was justified in refusing to pay over the policy moneys without the consent of *A.'s* legal personal representative; 2, dispensing with the legal personal representative of *A.* under the *Chancery Improvement Act*, 1852, s. 44; and 3, ordered payment of the policy moneys, with interest at 4 per cent. from the date when demand of payment was made.—On appeal on the question of interest:—*Held*, that as the default or delay in payment of the policy moneys had been caused, not by the company, but by *B.'s* neglect to clothe himself with a legal title to the money, interest did not commence to run till the order for payment of the principal was made.—*Crossley* v. *City of Glasgow Life Assurance Company* (4 Ch. D. 421) overruled on this point.—*Quære*, whether, in an action by an equitable mortgagee of a life policy against the assurance company claiming payment of the policy moneys, the Court has jurisdiction, under the 44th section of the *Chancery Improvement Act*, 1852, to dispense with the legal personal representative of the assured. Webster *v.* British Empire Mutual Life Assurance Company - C. A. 169

INSURANCE COMPANY - - - 79
See Company. 3.

INTEREST—Advancement - - - 539
See Will. 4.

—— Claim against Crown by next of kin - 67
See Crown.

—— Policy of insurance - - - 169
See Insurance.

—— Purchase-money - - - 122
See Vendor and Purchaser. 1.

—— Solicitor's disbursements - - 130
See Solicitor.

INTERROGATORIES—Co-defendant to counterclaim - - - - 162
See Practice. 8.

INTESTACY—Assignment to the Crown - 67
See Crown.

—— Share of residue - - - 635
See Will. 6.

INVESTMENT—Advice of Court—Person of unsound mind - - - - 78
See Trustee Relief Act.

—— Power to retain—Will - - - 74
See Administration. 2.

INVESTMENT TRUST—Illegality - - 247
See Company. 2.

ISSUES—Trial of, separately - - 475
See Practice. 5.

JOINTURING POWERS - - - 570
See Settlement. 4.

JUDGMENT—Mortgagor—Redemption - 93
See Mortgage. 1.

JURISDICTION—Injunction—Foreign Court 591
See Foreign Suit.

—— Partition Act - - - - 165
See Partition.

LANDS CLAUSES ACT—*Compulsory Powers—Owner—Failure to make title—Payment into Court—Lands Clauses Act* (8 *Vict. c.* 18), *ss.* 76, 77.] The Plaintiffs contracted to sell land to the Defendants, but failed to make any title to a small portion thereof. Thereupon the Defendants paid the purchase-money of the whole land (after making certain deductions therefrom in accordance with the contract) into Court under sect. 76 of the *Lands Clauses Act*, and executed a deed poll under sect. 77 purporting to vest the whole of the land in themselves:—*Held*, that the Plaintiffs were not "owners" of the strip of land within the meaning of sects. 76 and 77, and that under the circumstances the Defendants could not acquire the land under those sections. Wells *v.* Chelmsford Local Board of Health - 108

LAPSE—Share of residue - - 539, 635
See Will. 4, 6.

LEASE—Agreement to assign - - 96
See Specific Performance.

—— Bankruptcy—Disclaimer - - 289
See Bankruptcy. 5.

LEASEHOLDS—Conversion—Enjoyment in specie
See Administration. 2. [74

LEGAL ESTATE—Contingent remainders - 59
See Will. 2.

LEX LOCI—Scotch marriage - - 614
See Settlement. 2.

LIEN—Vendor - - - - 649
See Vendor and Purchaser. 4.

LIFE INSURANCE - - - - 169
See Insurance.

LIMITATION OF TIME—Proceedings under Local Government Act - - - 378
See Local Government Act.

LIMITATIONS, STATUTE OF—*Mortgagee in Possession—Bankruptcy of Mortgagor—Acknowledgment of Mortgagor's Title after Bankruptcy—Annulment of Bankruptcy—3 & 4 Will. 4, c. 27, ss. 28, 34—Principal and Agent.*] In 1828 the Plaintiff mortgaged freehold property to *B.*, and in 1832, being about to reside abroad, he gave a full power of attorney to the Defendant, who was a solicitor, to receive the rents and profits of all his property, and to apply them in payment of the incumbrances. In 1841 the Plaintiff settled accounts with the Defendant, shewing a large balance due to the Defendant, which the Plaintiff agreed to secure by a mortgage of his real estates when required. In 1845 the Plaintiff became bankrupt, but his assignee did not interfere with the mortgaged property, and the Defendant continued to receive the rents and profits. In 1849 the Defendant took a transfer himself of *B.'s* mortgage to which the Plaintiff was not a party. In 1865 the Defendant wrote a letter to the Plaintiff expressing his readiness to settle all accounts.—In 1877 the Plaintiff's bankruptcy was annulled, and the Plaintiff brought an action against the Defendant

LIMITATIONS, STATUTE OF—*continued.*
claiming to redeem the mortgage, and claiming an account against him as mortgagee in possession, and, by amendment, as agent and trustee for him. The Defendant pleaded the *Statute of Limitations*:—*Held* (reversing the decision of *Hall*, V.C.), that on the Plaintiff's bankruptcy the Defendant ceased to be the agent and attorney of the Plaintiff, and did not become the agent of the assignee: and that even if the assignee would have been entitled to call upon the Defendant to account, the Plaintiff did not, on the annulment of the bankruptcy, succeed to the assignee's right; that, the Plaintiff's estate as mortgagor having ceased on the bankruptcy, the letter written to him in 1865 could not operate as an acknowledgment, either of his title or that of the assignee, to the equity of redemption, so as to take the case out of the *Statute of Limitations*; that as the assignee was barred by the statute the Plaintiff was also barred, notwithstanding the annulment of the bankruptcy.—The action was therefore dismissed with costs.—Whether an acknowledgment of the title of a mortgagor is effectual to take the case out of the *Statute of Limitations*, if it is not made till after the time limited by the statute has expired, *Quære.* MARKWICK *v.* HARDINGHAM C. A. 339

—— Acknowledgment by bankrupt - 125
See BANKRUPTCY. 3.

—— Debt of married woman - - 87
See HUSBAND AND WIFE. 2.

LIQUIDATION—Injunction - - 223
See BANKRUPTCY. 6.

LIQUIDATOR—Power to continue business of company - - - - 353
See COMPANY. 7.

—— Summons of witness - - - 139
See COMPANY. 8.

LIS PENDENS—Assignment of estate *pendente lite* - - - - - 426
See CHAMPERTY.

LOCAL GOVERNMENT ACT—*Public Health Act*, 1848 (11 & 12 *Vict. c.* 63), *ss.* 69, 129—*Local Government Act*, 1858 (21 & 22 *Vict. c.* 98), *s.* 62—*Local Government Amendment Act*, 1861 (24 & 25 *Vict. c.* 61), *ss.* 23, 24—*Expense of Sewering and Paving—Private Improvement Expenses—Election of Remedy—Charge upon Land—Summary Proceedings—Limitation to Six Months.*] A local board, in the year 1864, determined to do certain works in a street adjoining the Defendant's house, for the expenses of which the Defendant, among others, was made liable under sect. 69 of the *Public Health Act*, 1848, and for which, consequently, there was a charge on the property under the 62nd section of the *Local Government Act*, 1858. Before the works were done they resolved that the expenses were private improvement expenses under the 90th section of the *Public Health Act*, 1848, and should be recovered from the owners and occupiers by annual instalments. In 1872 they revoked the resolution, and made a fresh rate for the whole amount then remaining unpaid to be paid by the owners and occupiers. This rate being unpaid in 1875, they brought an action against the Defendant to enforce the charge on his land under the 62nd section of the Act of 1858:—*Held* (reversing the

LOCAL GOVERNMENT ACT—*continued.*
decision of *Malins*, V.C.), first, that the limitation of six months, within which summary proceedings must be taken before the justices or in the County Court under the *Local Government Act*, 1861, does not apply to the enforcing of the charge created by the 62nd section of the *Local Government Act*, 1858. Secondly, that the election of the board to declare the expenses to be private improvement expenses did not prevent them from enforcing the charge on the land, but that they could only enforce it in respect of the instalments that were for the time being in arrear. TOTTENHAM LOCAL BOARD OF HEALTH *v.* ROWELL - C. A. 378

LUNATIC—*Practice—Order to inspect Documents by a Person claiming under a deceased Lunatic.*] According to the practice in Lunacy the Court will order production of all documents in the custody of the Master or Registrar relating to the estate of a deceased lunatic on the application of a person claiming under him. But he must make out a *primâ facie* title to the estate. *In re* SMYTH (A LUNATIC) - - - - C. A. 286

2. —— *Sale of Lunatic's Property, reserving the Minerals—Lunacy Regulation Act*, 1853 (16 & 17 *Vict. c.* 70), *s.* 124.] The Court has power under the *Lunacy Regulation Act*, 1853, s. 124, to make an exchange of the land of the lunatic without the minerals under it. *In re* DICCONSON (A LUNATIC) - - - - C. A. 316

MANDATORY INJUNCTION—Pumping water
See MINE. [113

MARRIAGE—Consideration of — Limitation to next of kin - - - - 580
See SETTLEMENT. 1.

MARRIED WOMAN—Claims of next of kin and personal representatives - - 228
See POWER. 1.

—— Separate estate - - - 87, 655
See HUSBAND AND WIFE. 1, 2.

MEASURE OF DAMAGES—Mining without consent of tenant - - - 150
See COPYHOLD.

MINE—*Jurisdiction—Preservation of Property—Mandatory Injunction—Pumping—Lease of Colliery—Usual Clauses—Reference to Chambers to settle Lease—Declaration that particular Clause is not to be inserted—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8—*Rules of Court*, 1875, *Order* LII., *r.* 3.] Under Order LII., rule 3, of the Rules of Court, 1875, the Court has power in a proper case to grant an interim injunction to restrain a defendant from ceasing to pump water out of a mine.—Independently of a special custom, a provision that the lessee shall be entitled to determine the lease when the mine is incapable of being worked at a profit is not a usual clause in the lease of a colliery:—*Held*, on the evidence, that such a provision is not usual in a lease of a colliery in *Derbyshire.—Lord Abinger* v. *Ashton* (Law Rep. 17 Eq. 358) explained.—When the Court directs a reference to Chambers to settle the terms of a lease, it will, when convenient, at the same time make a declaration as to the insertion of a particular clause with regard to which an issue has been raised in the pleadings. STRELLEY *v.* PEARSON - - - - 113

MINERALS—Copyhold—Mining without consent of tenant - - - - 150
See Copyhold.
—— Reservation of—Lunatic - - 316
See Lunatic. 2.
MINING LEASE—Usual clauses - - 113
See Mine.
MISTAKE—Sale of land—Boundaries - 215
See Vendor and Purchaser. 2.
—— Settlement - - - 570, 655
See Settlement. 3, 4.
—— Title - - - - - 96
See Specific Performance.

MORTGAGE—*Foreclosure Action—Debt payable by Instalments—Personal Judgment against Mortgagor—Redemption by Third Person—Securities to be transferred by Mortgagee—Sale—Leave to apply in Chambers*—15 & 16 *Vict. c.* 86, *s.* 48.] In a foreclosure action personal judgment for the mortgage debt being given against the mortgagor, and a foreclosure judgment against the mortgagor and a purchaser from him:—*Held*, that the purchaser, in the event of his redeeming the mortgage, would be entitled to have transferred to him the personal judgment against the mortgagor, as being one of the securities held by the mortgagee for the debt.—Leave was given to the purchaser to apply in Chambers for a sale of the property.—Form of foreclosure judgment when mortgage debt is payable by instalments. Greenough *v.* Littler - - - - 93

2. —— *Priority—Constructive Notice—Equitable Priorities—Notice through Solicitor—Equitable Estates—Priority of Time.*] The rule that notice of a trust through his solicitor is not imputed to a mortgagee where the solicitor is a party to a fraud, discussed.—*Espin* v. *Pemberton* (3 De G. & J. 547) and *Rolland* v. *Hart* (Law Rep. 6 Ch. 678) considered.—A trustee (a solicitor) used trust funds in purchasing an estate which was conveyed to his brother, and afterwards acted as solicitor for his brother, the mortgagee, in raising money on the estate by legal and afterwards by equitable mortgages:—*Held*, that the legal mortgagee had priority over the *cestuis que trust*, for that the fraud of the solicitor ran through the whole transaction, and prevented the imputation of notice:—*Held*, also, that the claim of the *cestuis que trust* was an equitable estate of the same quality as the estates of the equitable mortgagees, and had priority over them as being prior in time.—*Phillips* v. *Phillips* (4 D. F. & J. 208) considered. Cave *v.* Cave - - - 639

3. —— *Unconscionable Bargain—Money Lending Transaction—Usurious Charges—Expectant Heir—Mere General Expectation of Property.*] The principle on which a Court of Equity has granted relief from an unconscionable bargain entered into with an expectant heir or reversioner for the loan of money, applies also to the case of money being lent on unconscionable terms (not fully understood by the borrower, and known not to be fully understood by him by the lender), to a young man, being a minor at the time of the first transaction, the son of a father possessing large property, who has no property of his own and no expectation of any, except such general expectations as are founded on his father's position in life, the money being lent without any thought of repayment by the borrower, but on the credit of such general expectations, and in the hope of extorting payment from the father to avoid the exposure attendant on the son's being made a bankrupt. Nevill *v.* Snelling - - 679

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—— Leasehold—Bankruptcy of mortgagors—Disclaimer - - - - 289
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—— Mortgagee in possession—Statute of Limitations - - - - - 339
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—— Policy of life insurance—Payment to mortgagee - - - - 169
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NECESSARIES—Married woman - - 87
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—— Limitation to—Marriage settlement - 580
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—— Married woman—Personal representatives
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OWNER—Lands Clauses Act—Failure to make title - - - - - 108
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PARTIES—Adding by amendment - 423, 490
See Practice. 1, 9.
—— Representatives - - - - 655
See Settlement. 3.
—— Trustees - - - - - 665
See Husband and Wife. 1.

PARTITION — *Equitable Estate — Overriding Trusts—Further Evidence.*] Under a will two persons were equally entitled to real property for life with remainder to their children and issue, who were not yet ascertained. The trustees of the will had, during the lives of the tenants for life, powers of working a quarry on the estate, and making roads over the property for the purpose, and were directed to work the quarry and divide the profits among the persons entitled:—*Held* (affirming the decision of *Fry*, J.), that, while the overriding power and trust existed, the Court had no jurisdiction to make a decree for partition or sale under the Partition Acts.—Where at the trial of an action the witnesses have been examined *viva voce*, further evidence by affidavit of the same witnesses will not in general be admitted on an appeal. Taylor *v.* Grange - C. A. 165

PARTNERSHIP PROPERTY—Bequest to charity
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See COMPANY. 1.

PATENT—*Slander of Title—Allegation of Infringement—Threatening Legal Proceedings—Damages—Injunction—Practice—Statement of Claim—Leave to amend—Fraud.*] A patent, so long as it subsists, is *primâ facie* good, and therefore a patentee who issues notices against purchasing from a vendor alleging infringements of his patent is not bound to follow up his notices by taking legal proceedings; and, provided he issues the notices *bonâ fide* in assertion of what he believes, though erroneously, to be his legal rights under his patent, he does not render himself liable to an action by the vendor for damages for injury caused by issuing them: though he may be liable, notwithstanding his *bona fides*, to be restrained by injunction from continuing to issue the notices, if it is proved in the action for an injunction that his allegation of infringement is untrue.—*Rollins* v. *Hinks* (Law Rep. 13 Eq. 355) and *Axmann* v. *Lund* (Law Rep. 18 Eq. 330) considered. HALSEY *v.* BROTHERHOOD - - - - 514

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POLICY—Life insurance - - - 169
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POSSESSION—Purchaser of land - - 122
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POWER—*General Power of Appointment—Infant—Different Classes of Powers—Power coupled with an Interest—Power Collateral, or in Gross—Marriage Settlement—Infant Married Woman—Volunteers—Next of Kin.*] By a settlement made on the marriage of a lady then, and therein described as, "an infant of the age of nineteen years and upwards," it was agreed that, after the marriage, as soon as the case would admit, certain personal estate standing in the names of the trustees of her father's will in which the lady would take a vested interest on her marriage subject to an annuity for her mother's life, should be assigned to trustees, in trust for investment with the consent of the husband and wife, and to pay the income to the wife for her separate use, and after her death to her husband till bankruptcy or alienation; and then to hold the capital on trusts for the issue of the marriage; and, in default of such issue, in trust for such person or persons as the wife should by deed or will appoint. The wife appointed the fund by deed to her husband, and died without issue, being still an infant. An action having been brought by the trustee in the husband's bankruptcy, who was also the legal personal representative of the wife, against the next of kin of the

POWER—*continued.*

wife, claiming the property:—*Held*, by *James* and *Brett*, L.JJ. (*dissentiente Cotton*, L.J.), affirming the decision of *Jessel*, M.R., that the appointment by the wife, while still a minor, was valid.—*Hearle* v. *Greenbank* (3 Atk. 695) commented on.—*Held*, also, by the whole Court, that whether the appointment was valid or not, the wife's next of kin, being volunteers, could not claim under the settlement in opposition to her legal personal representative. *In re* D'ANGIBAU. ANDREWS *v.* ANDREWS - - - - C. A. 228

2. —— *General Power of Appointment—Settled Estate—Proceeds of Sale of Real Estate—Will—Construction—Appointment of Real Estate, and Residuary Gift of Personal Estate.*] Under a settlement a testator had a general power of appointment over the reversion in fee of certain real estate thereby settled and which the trustees were empowered to sell with his consent, there being no express power of reinvestment of the proceeds of sale. During his lifetime, and with his consent, parts of the real estate were sold. Shortly afterwards—some of the real estate still remaining unsold—he made his will, whereby, after reciting that under the settlement the real estate comprised therein was subject to such uses as he should appoint, he appointed the same to the use of trustees for a term of 500 years, and, subject thereto, to the use of his son in fee; and, without prejudice to that appointment, he gave all the real and personal estate of or to which he was seised or possessed, or over which he might have any power of appointment, to his widow absolutely:—*Held*, that the purchase-money of the real estate sold—which had been received by the trustees of the settlement and invested by them in *India* Stock—passed to the widow under the residuary gift, and not to the son under the prior appointment.—*Gale* v. *Gale* (21 Beav. 349) followed. BLAKE *v.* BLAKE - - - - - 481

3. —— *General Power of Appointment—Settlement—Real Estate—Power of Sale—Direction to lay out Money in Purchase of Land—Conversion—Reinvestment in Government Funds—Will—General Bequest—"My personal Estate"—Exercise of Power of Appointment—Wills Act*, 1837 (1 *Vict. c.* 26, *ss.* 1, 27).] By *A.'s* marriage settlement, dated in 1832, her father settled certain real estate to the use of *A.* for life, and after her death, and, in default of issue of the marriage, to the use of such persons as she should by will appoint. The settlement contained a power for the trustees to sell the real estate with a direction to lay out the proceeds, with *A.'s* consent, in the purchase of other hereditaments to be settled to the like uses, with a power of interim investment, with the like consent, in Government securities.—By his will, dated in 1831 and confirmed, subject to the settlement, by a codicil executed in 1832, shortly after the settlement, *A.'s* father devised the property, subject to the settlement, and all other his real estate, to the use of *A.* for life, and, in default of her having any issue, to such uses as she should by will appoint.—Some years afterwards, *A.'s* father and husband both having died and there having been no issue of the marriage, the trustees of the settlement, at *A.'s* request, sold all the settled real estate for a sum of

POWER—*continued.*

£24,226 2*s.* Consols, which they transferred to her. —*A.* died a widow in 1879, having by her will, dated in 1875, shortly after the transfer to her of the consols, after appointing executors and bequeathing pecuniary legacies amounting to upwards of £30,000, bequeathed "all the residue of my personal estate and effects whatsoever" to two persons absolutely. The personal estate to which *A.* was entitled at the date of her will and of her death, independently of the £24,226 2*s.* Consols, did not amount to more than £6000:—*Held*, that, having regard to sect. 27 of the *Wills Act*, 1837 (1 Vict. c. 26), that the interpretation clause, sect. 1 ("personal estate"), *A.'s* will should be read as an appointment of "all the Government and other funds and all personal property over which I shall, at the time of my death, have a general power of appointment by will"; and that the will operated as an execution of the powers of appointment over the real estate given to her by her marriage settlement and her father's will, and passed the consols. CHANDLER *v.* POCOCK [491

4. —— *Testamentary Appointment—Bond to appoint a certain Sum by Will—Fraud on Power.*] A father, who had a limited power of appointment over a fund by will only, among his children, made a will by which he appointed a sum of £5000 to his son *J.*, and the remainder among his other sons. A few weeks afterwards he executed a bond binding himself that his son *J.* should receive, either out of his own property or out of the fund subject to the power, the sum of £5000 at the least. The father died without revoking his will:—*Held* (affirming the decision of *Jessel*, M.R.), that the appointment was valid.—*Coffin* v. *Cooper* (2 Dr. & Sm. 365) followed.—*Held*, also, by *Brett*, L.J. (*dubitante Cotton*, L.J.), that a bond or covenant by the donee of a limited testamentary power that he will exercise it in a particular way is entirely void. PALMER *v.* LOCKE - C. A. 294

—— Exclusive power - - - 614
See SETTLEMENT. 2.

—— Revocation - - - - 570
See SETTLEMENT. 4.

—— To retain investments—Will - - 74
See ADMINISTRATION. 2.

PRACTICE—*Amendment after Decree—Adding Parties—Enforcing Decree against New Parties—Rules of Court*, 1875, *Order* XVI., *r.* 13.] A decree was made in 1875 against the corporation of *Birmingham* as the sanitary authority of *Birmingham*, granting a perpetual injunction to restrain them from allowing sewage to flow into a river, the injunction being suspended for five years to give the borough an opportunity to execute certain works. At the expiration of that period the Plaintiffs desired to enforce the injunction, but in the meantime the *B. T. & R.* Board had succeeded to the rights and liabilities of the corporation of *Birmingham* in respect of the sewage:—*Held*, by *Bacon*, V.C., that under Rules of Court, 1875, Order XVI., r. 13, liberty could be given to the Plaintiffs to amend their bill by making the *B. T. & R.* Board parties.—*Held*, on appeal, that such an amendment could not be made after final decree, and that the decree could only be enforced against the board by an action. ATTORNEY-GENERAL *v.* CORPORATION OF BIRMINGHAM [C. A. 423

2. —— *Costs—Apportionment of Costs—Claim dismissed—Counter-claim dismissed.*] Where the Plaintiff's claim and the Defendant's counter-claim are both dismissed with costs, the Plaintiff is to pay to the Defendant the general costs of the action, and the Defendant is to pay to the Plaintiff only the amount by which the costs have been increased by reason of the counter-claim.—*Saner* v. *Bilton* (11 Ch. D. 416) approved. MASON *v.* BRENTINI - - - - C. A. 287

3. —— *Costs—Settlement—Appointed and unappointed Shares—Costs to be borne rateably.*] By the exercise of the usual power of appointment in a marriage settlement the shares of children were appointed unequally, but were equalized, or nearly so, by a division of the unappointed property under a hotchpot clause:—*Held*, that the costs of an action to administer the trusts of the settlement must be paid rateably out of the appointed and unappointed shares. MOORE *v.* DIXON [566

4. —— *Costs—Petition presented without Authority of co-Petitioner—Amendment of Order—Rules of Court*, 1875, *Order* XLI. *a.*] A petition for the appointment of new trustees and a vesting order was presented in the names of several co-Petitioners, and an order made. Upwards of a year afterwards an application was made to the Court by persons who had been joined as co-Petitioners that the order might be rescinded on the ground that they had only recently heard of the petition, which was in no way authorized by them:—*Held*, that the order made could not be rescinded by the Court, but should be amended by striking out the names of the applicants as co-Petitioners, and treating them as not having been served with the petition.—Where a solicitor acts without authority, he must, as a general rule, pay the costs thereby occasioned. *In re* SAVAGE [557

5. —— *Counter-claim—New Issue—Application by Defendant for Separate Trial of Issues—Rules of Court*, 1875, *Order* XXXVI., *r.* 6.] An application to have one issue in an action tried before another can only be granted on very special grounds.—Where a Defendant in a partnership action set up by counter-claim an agreement by the Plaintiff for sale to the Defendant of his (the Plaintiff's) interest in the partnership at a stated price:—*Held*, that the Defendant was not entitled under Rules of Court, 1875, Order XXXVI., rule 6, to have the issue raised by his counter-claim tried before the Plaintiff's issues in the action.—*Emma Silver Mining Company* v. *Grant* (11 Ch. D. 918) explained in reference to the exceptional cases in which the Court will accede to applications under Order XXXVI., rule 6. PIERCY *v.* YOUNG - 475

6. —— *Discontinuance of Action—Counter-claim.*] A counter-claim is part of the original action, and, when the action has been discontinued, no further step can be taken in the counter-claim. VAVASSEUR *v.* KRUPP - - - - 474

7. —— *Discovery—Document of Title—Refusal to produce—Admission as Evidence—Rules*

PRACTICE—*continued.*

of Court, 1875, *Order* XXXI., *rr.* 14, 17.] A plaintiff cannot generally be compelled to produce to the defendant a document relating to his own title only, though such document is referred to in his pleadings, until the defendant has put in his defence.—A plaintiff who in his pleadings referred to a document on which his titled depended and declined to produce it to the defendant before statement of defence was put in, was held to have "sufficient cause for not complying with the notice" to produce under Order XXXI., rule 14, of the Rules of Court, 1875. WEBSTER *v.* WHEWALL [120

8. —— *Leave to exhibit Interrogatories for Examination of Opposite Party—Counter-claim—Rules of Court*, 1875, *Order* XXXI., *r.* 1.] *M.* commenced an action against *K.* *K.* delivered a defence and counter-claim, to which *M.* and *I.* were Defendants. *I.* applied for leave to exhibit interrogatories for the examination of *M.*:—*Held*, by *Hall*, V.C., and by the Court of Appeal, that as *I.* was not a defendant in the original action, and *I.* and *M.* were co-defendants in the counter-claim, they were not opposite parties, and that *I.* had no right to interrogate *M.* MOLLOY *v.* KILBY [C. A. 162

9. —— *Parties — Administration Action — Parties served with Notice of Decree—Further Consideration — Order against Party without Notice.*] When notice of an administration judgment has been served on parties interested, and afterwards, on further consideration, it is desired to obtain an order against them personally for payment of money, they should be served with notice of the action having been set down for further consideration, even though they have not obtained an order to attend the proceedings. *In re* REES. REES *v.* GEORGE - - - 490

—— Amendment of statement of claim - 314
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—— Appeal—Bankruptcy - - 292, 400
See BANKRUPTCY. 4, 7.

—— Foreclosure—Judgment - - 93
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—— Further evidence by affidavit - 165
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—— Lunacy - - - - - 286
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—— Reference to Chambers - - 113
See MINE.

—— Trustee Act - - - - 317
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—— Trustee Relief Act - - - 78
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PRINCIPAL AND AGENT—Bankruptcy of principal - - - - - 339
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PRINCIPAL AND SURETY—Proof by surety in bankruptcy - - - - 400
See BANKRUPTCY. 7.

PRIORITY—Mortgage - - - 639
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PRIVATE IMPROVEMENT EXPENSES - 378
See LOCAL GOVERNMENT ACT.

PRODUCTION OF DOCUMENTS - - 120
See PRACTICE. 7.

PROOF—Bankruptcy - - - 400
See BANKRUPTCY. 7.

—— Winding-up - - - - 465
See COMPANY. 6.

PROSPECTUS—Misrepresentation - - 507
See COMPANY. 4.

PUBLIC HEALTH ACT—Private improvement expenses - - - - 378
See LOCAL GOVERNMENT ACT.

PUMPING WATER—Mine - - - 113
See MINE.

RAILWAY—*Statutory Powers—Diversion of Non-navigable River—Necessity for Construction of Railway — Railway Clauses Consolidation Act*, 1845 (8 *Vict. c.* 20), *s.* 16.] The power conferred on a railway by the 16th section of the *Railways Clauses Consolidation Act* to divert the course of a river or road, "in order the more conveniently to carry the same over or under or by the side of the railway, as they may think proper," is to be taken as cut down and qualified by the proviso that it be an act necessary for making, maintaining, altering, or repairing and using the railway. —Such a power, therefore, only authorizes such a diversion when the road or river presents an actual obstacle to the construction of the line, and not in a case where the diversion is merely for the purpose of saving the company expense.—*Reg.* v. *Wycombe Railway Company* (Law Rep. 2 Q. B. 310) followed and approved. PUGH *v.* GOLDEN VALLEY RAILWAY COMPANY - - - - C. A. 330

RATES—Public Health Act - - 378
See LOCAL GOVERNMENT ACT.

RECTIFICATION OF DEED - 570, 655
See SETTLEMENT. 3, 4.

REDEMPTION - - - - 93
See MORTGAGE. 1.

REGISTRATION—Bill of sale - - 42
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RESCISSION—Contract for shares - - 507
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RESERVATION OF MINERALS—Lunatic 316
See LUNATIC. 2.

RESIDUARY GIFT - - 539, 594, 635
See WILL. 4, 5, 6.

RESTRAINT OF TRADE—*Trade—Sale of Goodwill—Injunction—"Dealing with" Customers of old Firm.*] Where two partners dissolved partnership on the terms that one shall have the goodwill and continue the business, and the retiring partner sets up a similar business in the neighbourhood, the Court will grant an injunction to restrain the retiring partner from soliciting the old customers

RESTRAINT OF TRADE—*continued.*
of the firm, but will not restrain him from dealing with them.—The decision of *Jessel*, M.R., reversed. —*Ginesi* v. *Cooper & Company* (14 Ch. D. 596) disapproved. Leggott *v.* Barrett - **C. A. 306**
RESTRAINT ON ANTICIPATION—Remoteness
See Settlement. 5. [610
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—— Will - - - - - 594
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—— —— rr. 14, 17 - - - - 120
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—— **Order XXXVI., r. 6** - - - 475
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—— **Order XLI.a** - - - - 557
See Practice. 4.
—— **Order L., r. 3** - - - - 426
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—— **Order LII., r. 3** - - - - 113
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SALE—Lunatic's property - - - 316
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SCIENTER—Selling pirated works - - 501
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SCOTCH MARRIAGE—Settlement—English law
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SECURED CREDITOR - - - 447
See Bankruptcy. 8.
"SELLING KNOWINGLY"—Copyright - 501
See Copyright. 2.
SEPARATE ESTATE - - - 87, 665
See Husband and Wife. 1, 2.

SETTLEMENT—*Marriage Settlement—Consideration—Ultimate Limitation to Next of Kin—Volunteers—Creditors.*] By a marriage settlement of the wife's property, consisting of money in the funds, a general power of appointment by will was given to the wife, in the event of her dying before her husband without children, and in default of appointment there was a trust for the next of kin of the wife excluding the husband. But if the wife survived, then, in default of children, in trust for the wife absolutely. The father of the

SETTLEMENT—*continued.*
wife joined in the settlement, and covenanted to pay an annuity to his daughter. During the life of the husband and wife debts were contracted by the wife. There were no children, and the impossibility of there being any was not questioned:—*Held*, upon the application of the wife, and with the approbation of the husband, that the next of kin being mere volunteers, and not within the marriage consideration, the corpus of the trust funds might be applied in payment of debts. Paul *v.* Paul - - - **580**

2. —— *Marriage Settlement — Contract of Marriage made in Scotland—English Husband and Scotch Wife—English Real Estate and Personalty—Trusts in English and Scotch Forms—Lex Loci—Intention of the Parties—Power of Appointment—"Such Child or Children"—Exclusive Power.*] A contract of marriage was executed in *Scotland* (where the marriage took place) by a domiciled Englishman described as residing in *Scotland*, and a Scotchwoman described as residing there, and whose domicile was Scotch. Trusts were declared of English real property of the husband in English form, and of personalty in *Scotland* belonging to the wife in Scotch form: —*Held*, that the trusts of the husband's property were to be construed by English law. The trusts of the husband's property were for the husband for life, and after his death for the wife for life, and after the death of the survivor for "such child or children" of the marriage, and if more than one, in such shares as the husband and wife or the survivor should appoint:—*Held*, that it was an exclusive power, and that an appointment by the wife, who survived, of the whole of the property in favour of the eldest son of the marriage was valid. Chamberlain *v.* Napier **614**

3. —— *Marriage Settlement—Rectification—Evidence—Fiduciary Relation—Onus of Proof—Parties—Representation of Class*—15 & 16 *Vict. c.* 86, *s.* 51—*Rules of Court*, 1875, *Order XVI., rr.* 7, 13.] Rectification of a marriage settlement decreed at the instance of the wife after the death of the husband upon her uncorroborated parol testimony.—Upon the marriage of a widow with a retired solicitor, who had formerly acted as her solicitor, the whole of her property, amounting to more than £20,000, was vested in trustees, upon trust to pay the income to the wife for her life, and after her death to the husband for his life; and, as to the capital, upon trust, after the death of the wife, to pay one moiety thereof to the husband, his executors, administrators, or assigns, and to hold the other moiety upon such trusts as the wife should by deed or will appoint. By another deed, executed contemporaneously, the husband, in exercise of a power given to him by the will of his father, charged some estates of which he was tenant for life, with remainder to his issue in tail male, with the payment of an annuity of £100 to the wife for her life. The settlement was prepared by the husband himself the night before the marriage, and was brought by him to the wife for execution on the morning of the marriage day. She had no independent professional advice. After the husband's death she brought an action for the rectification of the settlement by omitting the trust of a moiety of

SETTLEMENT—*continued.*

the capital for the husband. The trustees and one of the next of kin of the husband were made Defendants. The Plaintiff deposed that her husband had told her that he wished every farthing of her property to be settled upon her, and that she was willing to allow him a life interest; that he said he would employ counsel; that the settlement did not carry out her intentions, and that she did not know what its provisions were until after the husband's death:—*Held*, that it was the duty of the husband to have explained to the wife in the most unmistakable terms, and with due opportunity for deliberation, the provision in his favour, and that, as the settlement on the face of it was not such as the Court would have sanctioned in the absence of agreement, the burden of proof was on the representatives of the husband, and the Plaintiff was entitled to the rectification which she claimed:—*Held*, also, that the fact that the Plaintiff claimed to retain the benefit of the settlement made on her by the husband was no bar to the rectification.—*Held*, that it was not necessary that the other next of kin should be made parties to the action, but that the drawing up of the judgment must be suspended for fourteen days, and that notice of the judgment must be served on those of the next of kin who were not parties. Lovesy *v.* Smith .. - 655

4. —— *Rectification—Improper Settlement—Power of Revocation—Powers of Jointuring and raising Portions.*] A father being seised in fee of a large estate, and having a small estate for life with remainder to his son in tail male, the father and son executed a deed of conveyance to the father in fee of the small estate, and a deed of settlement of the large estate to the use of the father for life, with remainder to the son for life, with remainder to the eldest and other sons of the son successively in tail male. The deed contained no powers of jointuring widows or of raising portions for younger children. A joint power of revocation appeared in the draft as originally prepared by counsel, but had been struck out. The father and son had each a wife and a large family, and each declared that had he been aware of the effect of the deed he would not have executed it:—*Held*, that under the circumstances the deed must be rectified by adding a power of revocation, and with the Plaintiff's consent it was directed that a new settlement, with all proper powers, should be made under the direction of the Court. Welman *v.* Welman - - - - 570

5. —— *Remoteness—Restraint on Anticipation.*] By indenture made in December, 1874, *S.* and *J. S.*, wife and husband, who had at the date of the indenture been married many years, and had two children, daughters, both married, assigned to trustees a sum of money in trust to invest for the benefit of the settlors, and after their deaths the trustees were to stand possessed of the moneys upon trust for their children as they or the survivor should appoint, and in default of appointment for all the children or any the child of *S.* by *J. S.* who being a son should attain twenty-one, or being a daughter should attain twenty-one or marry under that age, if more than one in equal shares, and if daughters for their separate use, and without power to alienate or anticipate the same. There were no other children of the marriage. *S.* died in 1876, and *J. S.* in 1879, without having made any appointment:—*Held*, that, notwithstanding the rule against perpetuities, the shares of the two daughters were subject to restraint on anticipation.—*In re Michael's Trusts* (46 L. J. (Ch.) 651); *Buckton* v. *Hay* (11 Ch. D. 645), and *Wilson* v. *Wilson* (4 Jur. (N.S.) 1076) considered. Herbert *v.* Webster - - - - - 610

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SOLICITOR—*Country Solicitor and London Agent—Suit for Account—Demand of Interest on Debt—Interest on Disbursements*—3 & 4 *Will.* 4, *c.* 42, *s.* 28—33 & 34 *Vict. c.* 28 (*Attorneys and Solicitors Act*, 1870), *ss* 3, 17.] Notwithstanding the definition of the word "client" in sect. 3 of the *Attorneys and Solicitors Act*, 1870, that Act does not apply to accounts between country solicitors and their town agents.—The Act is not retrospective, and therefore interest cannot be allowed under sect. 17 on disbursements made prior to the passing of the Act.—In May, 1872, a country solicitor commenced a suit against his *London* agent, claiming an account and taxation of the bills of costs between them. The Defendant filed his answer in October, 1872, and thereby alleged a large balance due to him and claimed interest thereon. He had also, in 1869, furnished the Plaintiff with an account which contained items for interest. In 1875 a copy of the account was inclosed in a letter which referred to the account, but made no formal demand of payment, and which was signed by a firm of solicitors as his agents:—*Held*, that neither the answer nor the letter inclosing the account was a sufficient demand in writing or notice within 3 & 4 Will. 4, c. 42, s. 28. Ward *v.* Eyre - - C. A. 130

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SPECIFIC PERFORMANCE—*Discretion of Court—Inconsistent prior Agreement—Lease—Covenant not to assign without written License of Lessor*—

SPECIFIC PERFORMANCE—*continued.*

Mistake of Title—Outlay of Money on another Person's Land—Acquiescence.] The Court will not compel a defendant specifically to perform an agreement when the result would be to compel him to commit a breach of a prior agreement with another person.—The lessee of three acres of land agreed in January, 1874, to let one acre to the Plaintiff for the whole of the residue of his term, and he agreed also to sell to the Plaintiff his interest in the whole three acres at any time within five years from the date of the agreement. The lease contained a covenant by the lessee not to assign the property, or to part with the possession of it or any part of it, without the written consent of the lessor. The Plaintiff was not, in fact, aware of this covenant. He was let into possession of the one acre, and he laid out money upon it, and also upon adjoining property of his own with the view of occupying the two together. The lessor was aware of this expenditure. In October, 1877, the lessee, without the Plaintiff's knowledge, surrendered the lease to the lessor, in exchange for a new lease for a longer term of the three acres together with other property. The new lease contained a similar covenant by the lessee not to assign, &c., without license. In November, 1877, the Plaintiff gave the lessee notice of his desire to exercise his option to purchase his interest under the original lease in the three acres. The lessee declined to perform his agreement, on the ground that the lessor refused to give his license to an assignment. The Plaintiff brought the action against the lessee and the lessor, claiming specific performance of the agreement by the lessee, and to compel the lessor to give his license, on the ground, *inter alia*, that he had acquiesced in the Plaintiff's expenditure knowing that he was acting in the mistaken belief that the lessee was able to assign the property to him. It appeared that the lessor was not, when the Plaintiff's expenditure was incurred, aware of the existence of the lessee's covenant not to assign without license:—*Held*, that the lessee could not be compelled to perform his agreement, inasmuch as his doing so would involve a breach of his prior covenant not to assign without license, for that, as the Plaintiff was seeking to treat the original lease as still subsisting for one purpose, he must treat the covenant not to assign contained in it as still subsisting:—*Held*, also, that inasmuch as the lessor was ignorant of his own rights, and there was nothing to shew that he knew that the Plaintiff had been acting in ignorance of his legal rights, the lessor could not be compelled to give his license to assign to the Plaintiff.—The circumstances under which the owner of a legal right will be precluded by his acquiescence from asserting it considered.—Mistake of fact is not the less a ground for relief because the person who has made the mistake had the means of knowledge. Willmott *v.* Barber - - 96

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7 Geo. 3, c. 38—*Copyright* - - 22
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17 Geo. 3, c. 57—*Copyright* - - 22
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3 & 4 Vict. c. 88—*Police* - - - 561
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TRADE-MARK — *Colourable Imitation — Trade Marks Registration Act*, 1875.] The Plaintiffs registered a trade-mark for worsted goods described as "a white selvage on each side of the piece having a red and white mottled thread interwoven the full length of the selvage between the edge of the piece and the edge of the selvage," and deposited a specimen at the *Patent Office Museum*. The specimen so deposited was undyed, and the selvage was white, the warp being white cotton and the woof white mohair, and nearly in the middle of the selvage was a compound warp thread composed of a thread of white cotton and a thread of Turkey red cotton twisted together. When the goods were dyed black the cotton threads took the dye imperfectly, so that the warp threads in the selvage became grey, while the woof became black, so as to make the selvage dark grey, with a dark red mottled line running along it. The Defendants sold black mohair goods with a dark grey selvage of nearly the same shade as that of the Plaintiffs, with a twisted thread running along its inner edge, which thread was originally white, red, and yellow, but in the course of dyeing the white became dark grey, and the yellow a dark olive, which could hardly be distinguished. The Plaintiffs sought to restrain the sale of these goods as an infringement, and moved for an injunction. There was evidence that the selvage, though not actually white, was what was known in the trade as a white selvage: —*Held*, by *Jessel*, M.R., that as the Plaintiffs' selvage was not white, and the mottled thread of the Defendants was different, and in a different position from that of the Plaintiffs, there was no infringement, and that an injunction must be refused—*Held*, by the Court of Appeal, that the principles according to which the Court acts in preventing a man from passing off his goods as those of another are not altered by the *Trade Marks Registration Act*, and that the question could not be disposed of by simple inspection of the patterns without considering whether the selvage was not, according to the understanding of the trade, a white selvage, and if it was, then whether the differences in quality and position of the Defendants' mottled thread were sufficient to distinguish the Defendants' goods from those of the Plaintiffs, so as to prevent purchasers from being misled, and that as there was a conflict of evidence on these points the motion must stand over till the trial, the Defendants undertaking to keep an account. MITCHELL *v.* HENRY **C. A. 181**

2. —— *Practice—Registration of Trade-Mark —Opposition to Application to register—Direction of Court, how to be obtained—Trade Marks Registration Act*, 1875 (38 & 39 *Vict. c.* 91), *and Trade Mark Rules*, 1876, *rr.* 16, 44.] Where an opposed application for the registration of a trade-mark stands for the determination of the Court under rule 16 of the Trade Mark Rules, 1876, the proper course for the purpose of raising the question is for the Registrar to require the opponent to apply for a direction as to the mode of trial, whereupon the person seeking to register is usually directed to take out a summons which is adjourned into Court.—A motion on behalf of the opponents for an injunction to restrain the proposed registration is irregular, for the application to the Court referred to in rule 44 of the Trade Mark Rules, 1876, means an application by the person seeking to register. *In re* SIMPSON, DAVIES, & SONS' TRADE-MARK - - - - - 525

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TRUSTEE ACTS— *Chambers— Vesting Order—Right to transfer Stock—Trustee Act*, 1850 (13 & 14 *Vict. c.* 60), *s.* 43—15 & 16 *Vict. c.* 80, *s.* 26—18 & 19 *Vict. c.* 134, *s.* 16—*Cons. Ord. xxxv., r.* 1.] In an action commenced by writ for the administration of a testator's estate, an order for accounts was made in Chambers under Order xv. Subsequently an order was made in Chambers directing the Plaintiff and Defendant to transfer a sum of stock into Court. The Defendant could not be found, and an order was made in Chambers vesting the right to transfer the stock in the Plaintiff, and directing him to transfer it into Court. The bank objecting to act on this order on the ground of its having been made in Chambers, a motion was made by arrangement for an order directing the bank to act upon it:—*Held*, by *Jessel*, M.R., that the Judge had jurisdiction to make the order on summons in Chambers, and that the bank ought to be ordered to act upon it.—*Held*, by the Court of Appeal, that, having regard to the 18 & 19 Vict. c. 134, s. 16, Cons. Ord. xxxv., r. 1, and the course of practice, there was so much doubt as to the jurisdiction as to render it unsafe to make such a vesting order in Chambers, and that the order directing the bank to act upon it ought to be discharged. Frodsham *v.* Frodsham [C. A. 317

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TRUSTEE RELIEF ACT— *Practice—Advice of Court—22 & 23 Vict. c.* 35, *s.* 30—*Married Woman of Unsound Mind—Income—Consent to Investment—Trustees.*] A married woman who was of unsound mind, but not so found by inquisition, was entitled for her separate use to the income of certain trust funds. Her written consent was also required to the investments by the trustees.—Upon a petition under the *Trustee Relief Act* (22 & 23 Vict. c. 35, s. 30) for the advice of the Court:—*Held*, that the Court had jurisdiction to entertain the petition; that the whole income might be paid to the husband on his undertaking to apply it to the maintenance of the wife, and that her consent to investments might be dispensed with. *In re* T—— - - - - - 78

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VENDOR AND PURCHASER—*Interest on Purchase-Money—Possession by Purchaser—Delay by Vendor—Vacant Land.*] A purchaser who before completion of the purchase exercises acts of ownership over the land agreed to be purchased must pay interest on the purchase-money pending delay in the completion of the contract, although the delay be caused by the vendor and the land is untenanted, so that he receives no rents nor profits from it. Ballard *v.* Shutt - 123

2. —— *Mistake—Specific Performance—Damages.*] Property was put up for sale under the description of "All that inn with the brewhouse, outbuildings, and premises known as *The Ship*, together with the saddler's shop and premises adjoining thereto, situate at *N.*, Nos. 454 and 455 on the tithe map, and containing by admeasurement twenty perches more or less." In the sale-room were plans of the property, which consisted of the closes numbered 454 and 455 on the tithe map. At the back of the property were two pieces of garden ground containing together about twenty perches, not belonging to the vendors, one of which had for many years been occupied with the inn and the other with the saddler's shop, and which were hardly at all fenced off from the premises with which they were occupied. The Defendant, who was acquainted with the property and knew that the gardens were occupied along with the inn and saddler's shop, did not look at the plans, and bought in the belief that he was buying the whole of the property in the occupation of the tenants:—*Held*, by *Baggallay*, L.J., sitting for *Malins*, V.C., and by the Court of Appeal, that the purchaser could not resist specific performance on the ground of mistake.—Where specific performance is refused on the ground of mistake by the Defendant, so that under the old practice a bill for specific performance would have been dismissed without prejudice to an action, the Court will proceed to consider the question of damages. Tamplin *v.* James - C. A. 215

3. —— *Trust for Sale—Sale by Heir of Surviving Trustee.*] A testator devised his freehold and copyhold estates to trustees and their heirs "upon trust that they his said trustees or the trustees or trustee for the time being of that his will," should sell the estates. He empowered "his trustees, or the trustees or trustee for the time being of that his will," to give receipts, and declared that if the trustees thereby appointed, or either of them, or any trustee or trustees to be appointed as hereinafter provided should die, or desire to be discharged, then and so often the said trustees or trustee might appoint a new trustee or new trustees. The trustees having died, the customary heir of the survivor contracted to sell part of the copyholds.—*Held* by the Court of Appeal, affirming the decision of *Jessel*, M.R., that the customary heir was competent to execute the trust for sale.—Whether *Cooke* v. *Crawford* (13 Sim. 91) is to be treated as overruled, *quære.*—*Osborne to Rowlett* (13 Ch. D. 774) doubted. *In re* Morton and Hallett - - - - C. A. 143

4. —— *Vendor's Lien—Purchase-money payable by Instalments—Liberty to apply as to future Instalments.*] In an action by a vendor whose purchase-money was to be paid by instalments, some of which were not yet due, for specific per-

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formance of his contract and a declaration of his lien, liberty was given to apply in respect of future instalments as they accrued due. Nives *v.* Nives - - - - - - - 649

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WILL—*Class or Personæ designatæ—Wills Act* (1 *Vict. c.* 26), *s.* 33.] Testator directed that at the decease of his wife (who died in his lifetime) his real estate and household furniture should be sold, and the moneys equally divided "between my nine children." He then bequeathed his personal estate not thereinbefore bequeathed to his trustees, upon trust to get in and convert the same into money, and pay and divide the same "equally to and between all my children," except that his eldest son *John*, by reason of his becoming entitled to a piece of property by a different title, should receive £30 "less than each of my other children": —*Held*, that the gift of residuary personalty was a gift to the testator's nine children as persons designated; and hence that the representative of a child who died in the testator's lifetime was entitled to participate by virtue of the 33rd section of the *Wills Act*, 1837. *In re* Stansfield. Stansfield *v.* Stansfield - - - - 84

2. —— *Contingent Remainders—Legal Estate in Mortgagee—Remainders preserved.*] A testator devised a freehold estate to the use of his son for life, and after his decease to the use of the children of his son who should attain twenty-one or die under that age leaving issue, and the heirs and assigns of such children in equal shares. The testator had mortgaged part of the devised estate, and at his death the legal estate was outstanding in the mortgagees. The testator's son died leaving four infant children:—*Held*, that as to the mortgaged portion of the estate the contingent remainders were preserved from failure by the legal estate outstanding in the mortgagees, but as to the remaining unmortgaged portion, the remainders failed on the death of the testator's son.—*Festing* v. *Allen* (12 M. & W. 279) commented on. Astley *v.* Micklethwait - 59

3. —— *Illegitimate Children.*] A testator gave to "my grandson *J.* (the son of my daughter *Alice Jane*, and who is now residing with me)" the sum of £500, to be paid to him if and when he should attain twenty-one, with power to apply the income in the meantime for his maintenance; but if he died under twenty-one the £500 and the unapplied income was to go in augmentation of the legacy of £2000 "hereinafter bequeathed in favour of the children and issue of my said daughter *Alice Jane*." The testator gave to trustees £2000 to be accumulated till the expiration of twenty-one years, or the death of *Alice Jane*, whichever might first happen, and then directed the fund and its accumulations to be divided amongst all the children of *Alice Jane* who should be then living, and the issue of such of them as should be then dead *per stirpes*. He gave two sums of £2500 upon trust for the children and issue of his two other daughters respectively, corresponding with the trusts of the £2000. The grandson was illegitimate. He attained twenty-one, and survived his mother:—*Held*, by the Master of the Rolls, and by the Court of Appeal, that the grandson *J.* was not entitled to participate in the £2000. Megson *v.* Hindle [C. A. 198

4. —— *Residuary Gift—Advancements to Children—Hotchpot Clause—Appointment of Executors —Codicil—Revocation of Share of Residue—Lapse —Trust—Next of Kin—Widow and Children— Application of Hotchpot Clause to lapsed Share— Interest on Advances, how chargeable—Statute of Distributions* (22 & 23 *Car.* 2, *c.* 10, *s.* 5)—11 *Geo.* 4 & 1 *Will.* 4, *c.* 40.] A testator gave his residuary estate to trustees—whom he also appointed his executors—in trust for sale, and to stand possessed of the proceeds in trust for his six children, *nominatim*, in equal shares, including two sons, *F.* and *J.*: and after reciting that he had already advanced £4000 to his son *F.* and £500 to his son *J.*, he declared "that neither of my said sons, nor any of my children who shall receive from me any sum of money for their advancement in the world, shall be entitled to any part of my residuary estate without bringing the said sums of £4000 and £500, and all other sums so given to any of my said children, with interest thereon at £5 per cent. per annum from the times of advancing the same respectively, into hotchpot."—By a codicil the testator revoked the provision made by his will in favour of his son *J.*, thereby causing a lapse of *J.*'s one-sixth of the residue.—The testator died leaving his widow and his six children his next of kin:—*Held*, that the codicil must be read as if it expressly declared a trust in the executors of the lapsed share of residue for the testator's wife and children according to the *Statute of Distributions:* and accordingly (reading the will and codicil as one instrument) that the hotchpot clause applied to the shares taken by the children under the codicil, but that it did not apply to the widow so as to increase her share under the codicil.—The £4000 and £500 advanced to *F.* and *J.* respectively, together with interest at 5 per cent. up to the testator's death, and interest at 4 per cent. on the aggregate amount in each case from the death, were therefore ordered to be brought into hotchpot in ascertaining their shares of residue.—In the absence of any direction by a testator to the contrary, advancements to his children on account of their portions bear no interest up to his death, but from his death they bear interest at 4 per cent. Stewart v. Stewart - - - 539

5. —— *Residue—Will of Personal Estate— Bequest to B. by Codicil of "all my personalty, such as cash, furniture, &c., to be applied as I have requested him"—Implied Revocation—Trust implied for Next of Kin—Parol Evidence—Attesta-*

WILL—*continued.*

tion by one of Next of Kin.] A testatrix who had by will and three codicils made a complete disposition of her real and personal estate, afterwards executed a fourth codicil in the following words: "I hereby bequeath to *B.* (to whom I have willed my landed property) also all my personalty, such as cash, furniture, &c., to be applied as I have requested him to do." *B.* gave evidence that before executing this codicil the testatrix had stated to him the alterations she desired to make in her will, and that he had made a pencil memorandum of her various fresh bequests, repeating each item to her, and that, except so far as to give effect to the new wishes so stated to him, the testatrix did not intend to alter her previous dispositions.—The memorandum was not signed by the testatrix.—*H.*, one of two joint beneficiaries of furniture mentioned in the memorandum, attested the execution of the fourth codicil:—*Held*, first, that the words "such as cash, furniture, &c.," did not cut down the words "all my personalty," and that the fourth codicil comprised and gave to *B.* as trustee the entire personal estate.—Secondly, that the nature of the trust was sufficiently established by the evidence of *B.*, and being so established the Court would give effect to it.—Thirdly, that *B.* held the personal estate in trust to carry out the dispositions of the will and first, second, and third codicils, with the alterations effected by the new dispositions specified in his evidence.—Fourthly, that if the Court could not have given effect to the intended trusts, then, as the fourth codicil contained no express revocation of the will and three first codicils, but was executed in order to create new interests which had failed, the original dispositions in the prior instruments would have remained in operation.—Fifthly, that as *H.* had attested the fourth codicil her beneficial interest under the parol trust failed, just as it would have done had the trust been declared in the codicil, and that the whole beneficial interest in the furniture belonged to the other joint beneficiary. *In re* Fleetwood. Sidgreaves *v.* Brewer 594

6. —— *Residue—Lapsed Share of Residue—Directed to fall into Residue—Intestacy—Codicil.*] *A. B.* by will gave real and personal estate to a trustee to sell and convert and out of the moneys to pay debts, and to divide the residue between five persons, named, equally. By a codicil *A. B.* bequeathed to the issue of *S. R.*, one of such persons, all the effects which by the will she had bequeathed to *S. R.*, who was stated to be dead, but

WILL—*continued.*

if there should be no issue living at *A. B.'s* decease, or being such, if such effects should not be claimed by such issue within twelve months after her decease, then such effects should fall into and be considered as part of the residue of the personal estate. *S. R.* never had any issue:—*Held*, that *S. R.'s* share of residue under the will was undisposed of.—*Humble* v. *Shore* (7 Hare, 247) and *Lightfoot* v. *Burstall* (1 H. & M. 546) followed.—*Crawshaw* v. *Crawshaw* (14 Ch. D. 817) distinguished. *In re* Barker's Estate. Hetherington *v.* Longrigg - - - - 635

7. —— *Words—"Cousins"—"First and Second Cousins."*] In construing a will, the well-defined legal meaning of a term used by the testator should not be altered unless there is something in the nature of a context to shew that it could not have been intended by the testator to have that meaning. Thus, a bequest to "first cousins," *simpliciter*, without a context, means cousins german; and a similar bequest to "second cousins" includes only second cousins strictly so called, and not persons standing in the same degree as second cousins, as, for instance, children of first cousins, or, as they are commonly called, first cousins once removed.—A testator gave one-third of all his property to his "first cousins," and two-thirds to his "second cousins." At his death the testator left first cousins, second cousins strictly so called, and also children and grand-children of first cousins:—*Held*, that the term "second cousins" did not include children or grand-children of first cousins. *In re* Parker. Bentham *v.* Wilson - 528

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